United States Court of Appeals for the Second Circuit

APPENDIX

ORIGINAL

77-6148,6154

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

DUPONT GLORE FORGAN INCORPORATED, *et al.*,
Plaintiffs-Appellants,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants and Third-Party
Plaintiffs-Appellees-Appellants,

P/S

—against—

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
DEC 5 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPENDIX

VOLUME 2 of 3
Pages 473a to 1064a

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STIPULATION AS TO DOCUMENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

- against -

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

- against -

UNITED STATES OF AMERICA,

Third-Party Defendant.

---X

73 Civ. 2447
(EW)

Stipulation as to Documents

The plaintiffs, the defendants and third-party plaintiffs, and the third-party defendant, by their undersigned attorneys, stipulate for purposes of this case only:

1. During the period 1960-1972, there were in effect between AT&T and each of the defendant operating companies "Agreements Covering Services, Licenses and Privileges," substantially similar to the agreement between American Telephone and Telegraph Company ("AT&T") and Southwestern Bell Telephone Company ("S.W. Bell"), marked Exhibit 1A (34707-34724)*, except for the agreements between AT&T and Pacific Northwest Bell Telephone Company ("P.N.W. Bell"), marked Exhibit 1B (34653-34662), The Pacific Telephone and Telegraph Company ("Pacific Tel."), marked Exhibit 1C (34663-34673), South Central Bell Telephone Company ("S.C.

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*The numbers appearing in parentheses are the production identification numbers stamped on the documents by the defendants and third-party plaintiffs in the course of discovery.

Bell"), marked Exhibit 1D (34674-34682), and Southern Bell Telephone and Telegraph Company ("Southern Bell"), marked Exhibit 1E (34683-34691).

2. For the period commencing January 1, 1971, there were in effect between AT&T and each of the defendant operating companies -- with the exception of P.N.W. Bell, Pacific Tel., S.C. Bell and Southern Bell -- "Division of Revenues Contracts" substantially in the form of the agreement between AT&T and Southern New England Telephone Company ("SNET") dated March 4, 1971, marked Exhibit 2 (34368-34375).

3. For the period commencing January 1, 1971, there were in effect "Division of Revenues Contracts" between AT&T and each of P.N.W. Bell and Pacific Tel. substantially in the form of the agreement between AT&T and P.N.W. Bell dated May 24, 1972, marked Exhibit 3A (34316-34329), and "Division of Revenues Contracts" between AT&T and each of S.C. Bell and Southern Bell substantially in the form of the agreement between AT&T and S.C. Bell dated March 16, 1971, marked Exhibit 3B (34343-34355).

4. Agreements similar to the "Agreement Regarding Provision of Facilities for Intercompany Services" between AT&T and Cincinnati Bell, Inc. ("Cincinnati Bell") dated September 30, 1968, marked Exhibit 4A (34765-34774), were entered into by AT&T with the following defendant operating companies as of the dates indicated:

The Bell Telephone Company of Pennsylvania ("Pennsylvania Bell")	June 26, 1968
Cincinnati Bell	September 30, 1968

The Diamond State Telephone Company ("Diamond State")	June 26, 1968
Indiana Bell Telephone Company ("Indiana Bell")	April 9, 1968
Michigan Bell Telephone Company ("Michigan Bell")	December 13, 1968
The Mountain States Telephone and Telegraph Company ("Mountain States")	June 1, 1967
New England Telephone and Telegraph Company ("N.E. Tel.")	November 1, 1973
New Jersey Bell Telephone Company ("N.J. Bell")	May 1, 1968
New York Telephone Company ("N.Y. Tel.")	July 14, 1967
Northwestern Bell Telephone Company ("N.W. Bell")	December 29, 1972
The Ohio Bell Telephone Company ("Ohio Bell")	June 25, 1968
S.C. Bell	June 5, 1970
Southern Bell	December 16, 1970

Agreements regarding provision of facilities for intercompany services were entered into on March 26, 1968 between AT&T and Pacific Tel., marked Exhibit 4B (34874-34878), and as of August 10, 1972 between AT&T and S.W. Bell, marked Exhibit 4C (34921-34932).

5. During the period 1960-1972, there were in effect written agreements between AT&T and each of the defendant operating companies relating to the interchange of the benefit obligations of the plans of AT&T and the defendant operating companies with respect to employees' pensions, disability benefits and death benefits, substantially similar to the agreement between AT&T and SNET dated June 28, 1935 and marked Exhibit 5 (35178-35186).

6. During the period since July 1, 1967, there was in effect an "Agreement Between Bell Telephone Laboratories and Operating Telephone Companies", marked Exhibit 6 (34741-34754).

7. Exhibits 7A through 7M, inclusive (11238-11695), are copies of the Annual Reports of AT&T for the years 1960-1972, each of which was prepared by AT&T and sent to the shareholders of AT&T.

8. On or about April 28, 1961, H. L. Kertz, Assistant Vice President of AT&T, sent to the General Commercial Manager of each of the defendant operating companies, with copies included for Marketing people, Chief Engineers and General Traffic Managers of each such company, a letter dated April 28, 1961 together with attached Notes on Rate Principles and Illustrative Rate Treatment for Centrex Service. The letter and Notes are marked Exhibit 8A and Exhibit 8B, respectively (09498-09508). Enclosed with the April 28, 1961 letter (Exhibit 8A) was a binder entitled "Centrex Service Rate Development Considerations". The binder is marked Exhibit 8C (09643-09731). Referred to in the April 28, 1961 letter (Exhibit 8A) is a letter of R. F. Landry, Assistant Vice President of AT&T, dated March 28, 1961, which was sent to the General Commercial Manager of each of the defendant operating companies and is marked Exhibit 8D (19740-19745).

9. With a letter dated March 24, 1961 C. N. Ostergren, Director of Engineering Economics of AT&T, sent to the Chief Engineers of each of the defendant operating companies (with copies for their Commercial Departments) a booklet described in paragraph 11 below. The covering letter of C. N. Ostergren is marked Exhibit 9 (12416).

10. On or about April 28, 1961, H. L. Kertz sent a letter, marked Exhibit 10 (12548), to the Operating and Marketing Vice Presidents of each of the defendant operating companies enclosing copies of his letter of the same date and accompanying notes, marked Exhibits 8A and 8B (09498-09508).

11. The Engineering Department of AT&T prepared a booklet dated March 1961 and entitled "Centrex - Development of Monthly Revenue Requirements". The booklet is marked Exhibit 11 (09530-09587).

12. On or about May 3, 1961, F. C. Smith, a Rate Administrator of AT&T, sent to W. B. Ellis, General Commercial Manager of The Chesapeake & Potomac Telephone Company of West Virginia ("C&P of W. Va."), a letter dated May 3, 1961 informing Mr. Ellis of a two-day meeting for employees of the defendant operating companies in New York at AT&T headquarters at 195 Broadway, on May 17 and 18, 1961, for a review of the proposed Centrex service. Other copies of this letter were sent to each of the other defendant operating companies. The letter is marked Exhibit 12 (19828).

13. The memorandum dated May 11, 1961 and marked Exhibit 13 (12492-12493), was prepared by John C. Turnier, a Rate Planning Engineer of SNET.

14. AT&T furnished to some or all of the defendant operating company employees attending the May 17 and 18, 1961 meeting copies of forty charts, which are marked Exhibit 14 (12574-12613).

15. An employee of The Chesapeake and Potomac Telephone Company ("C&P") who attended the May 17 and 18, 1961 meeting prepared or caused to be prepared the document which is marked Exhibit 15 (24711-24715).

16. An employee of SNET who attended the May 17 and 18, 1961 meeting prepared or caused to be prepared the document which is marked Exhibit 16 (12494-12500).

17. An employee of The Chesapeake and Potomac Telephone Company of Maryland ("C&P of Maryland") who attended the May 17 and 18, 1961 meeting prepared or caused to be prepared the document which is marked Exhibit 17 (19298-19306).

18. The order marked Exhibit 18 (40096-40100) was adopted by the Michigan Public Service Commission on April 6, 1961.

19. The memorandum dated May 16, 1961 and marked Exhibit 19 (19295-19297) was sent by S. C. Ramage, General Marketing Supervisor of C&P, to Richard F. DeButts, Assistant Vice President for Revenue Requirements of C&P.

20. The booklet entitled "Centrex PBX Service," marked Exhibit 20 (21014-21035), was prepared in July 1961 by the General Commercial Department, Engineering Section - Rate Unit of Mountain States.

21. The memorandum dated August 30, 1961 and marked Exhibit 21 (12520) was sent by F. E. Wollensack, Plant Extension Engineer of SNET, to W. F. Robb, Assistant Vice President - Revenue Requirements of SNET.

22. The memorandum dated October 10, 1961 and marked Exhibit 22 (11806-11807), was sent by P. O. Gunsalus, an Assistant Vice President of N.Y. Tel., to E. B. Nelson, Associate General Counsel of N.Y. Tel.

23. The memorandum dated September 13, 1961 and marked Exhibit 23 (30962-30967) was prepared in the Tariff Engineering Department of Pacific Tel.

24. The document marked Exhibit 24 (09811-09824) was apparently prepared by AT&T and was apparently sent in 1961 to one or more defendant operating companies.

25. The document dated November 9, 1961 and marked Exhibit 25 (30968-30972) was prepared by J. N. King, a Special Representative in the Regulatory Department of Pacific Tel.

26. The document dated November 15, 1961 (30980) and the attached Request for Information received by Pacific Tel. from the Staff of the California Public Utilities Commission on or about November 15, 1961 (30981) are marked Exhibit 26.

27. The document dated December 8, 1961 and marked Exhibit 27 (30992-30993) was prepared by Pacific Tel. and submitted by Pacific Tel. to the Staff of the California Public Utilities Commission on or about December 8, 1961.

28. The document dated December 18, 1961 (30998) and the attached Request for Information received by Pacific Tel. from the Staff of the California Public Utilities Commission on or about December 18, 1961 (30999-31000) are marked Exhibit 28.

29. The document dated December 27, 1961 and marked Exhibit 29 (31018-31021) was prepared by Pacific Tel. and submitted by Pacific Tel. to the Staff of the California Public Utilities Commission on or about December 27, 1961.

30. The document dated December 29, 1961 and marked Exhibit 30 (31024) was prepared by K. R. Crittenden, a General Representative in the Regulatory Department of Pacific Tel., and sent to C. F. Goode, a General Commercial Engineer in the Tariff Engineering Department of Pacific Tel.

31. The document dated January 5, 1962 and marked Exhibit 31 (31030) was prepared by Pacific Tel. and submitted by Pacific Tel. to the Staff of the California Public Utilities Commission on or about January 5, 1962.

32. The document dated January 15, 1962 and marked Exhibit 32 (31043-31044) was prepared by Pacific Tel. and submitted by Pacific Tel. to the Staff of the California Public Utilities Commission on or about January 15, 1962.

33. The document dated January 23, 1962 (31052) and the attached Commission Staff Suggestions on CENTREX Rate Proposal received by Pacific Tel. from the Staff of the California Public Utilities Commission on or about January 23, 1962 (31053-31054) are marked Exhibit 33.

34. The document dated February 9, 1962 and marked Exhibit 34 (31092) was prepared by K. R. Crittenden of Pacific Tel., and sent to C. F. Goode of Pacific Tel.

35. The memorandum marked Exhibit 35 (21047-21065) was prepared for the signature of certain officers of Mountain States in 1962.

36. The memorandum dated May 14, 1962 which, together with its four attachments, is marked Exhibit 36 (15143-15150), was prepared and sent by W. L. Newell, General Marketing Supervisor of N.W. Bell, to R. G. Zender, R. W. Olin, F. W. King, L. O. Arstad, B. R. Morris, and C. L. Sampson, the Assistant Vice President-Marketing, Rate Development Supervisor, Commercial Operations Supervisor, Assistant Vice President-Engineering, Vice President-Marketing, and Vice President-Operations, respectively, of N.W. Bell.

37. The memorandum dated February 1, 1965 which, together with its 7 page attachment entitled "Notes on Rate Principles and Illustrative Rate Treatment", is marked Exhibit 37A (09826-09834), was sent by F. C. Smith to the General Commercial Managers, General Traffic Managers, Chief Engineers and Public Relations Vice Presidents of each of the defendant operating companies. A further attachment entitled "Addendum to Notes Accompanying Letter Dated February 1, 1965" and marked Exhibit 37B (09835-09849) was distributed with Exhibit 37A to Rate Representatives of each of the defendant operating companies.

38. The memorandum dated February 20, 1964 and marked Exhibit 38 (39432-39464) was prepared by J. W. Gibson of Bell Telephone Laboratories, Inc.

39. The letter dated February 26, 1965 and accompanying notes marked Exhibit 39 (21114-21120) were sent by F. C. Smith to S. H. Jones, Commercial Operations Engineer of Mountain States. Copies of such letter, together with the accompanying notes, were sent by Smith to the General Commercial Managers of all defendant operating companies.

40. The memorandum dated June 7, 1971 and marked Exhibit 40 (17141-17148) was prepared by A. X. Ichter, the Rate Supervisor-Switching Systems and Channels of Pennsylvania Bell, and sent by him to J. B. Griffith, the General Accounting Supervisor-Taxes of Pennsylvania Bell.

41. The tariff pages marked Exhibit 41A (00708-00763) were filed by N.Y. Tel. with the New York Public Service Commission or the Connecticut Public Utilities Commission, as indicated on each page, and became effective on the date indicated on each page. The tariff pages

marked Exhibit 41B (17301-17351) were filed by Pennsylvania Bell with the Pennsylvania Public Utility Commission and became effective on the date indicated on each page. The tariff pages marked Exhibit 41C (24090-24113) were filed by Michigan Bell with the Michigan Public Service Commission and became effective on the date indicated on each page. The tariff pages marked Exhibit 41D (24826-24908) were filed by C&P with the Public Service Commission of the District of Columbia and became effective on the date indicated on each page.

42. The memorandum and rate sheet marked Exhibit 42 (11766-11771) was sent to K. T. Dutschmann, Vice President of N.Y. Tel., by P. O. Gunsalus, Assistant Vice President of N.Y. Tel.

43. In 1962 the Secretary of the Army, through his counsel, the Judge Advocate General, on behalf of the Department of Defense and other executive agencies of the United States Government, filed a protest to the Centrex tariffs filed by Southern Bell with the Tennessee Public Service Commission. The Tennessee Public Service Commission entered an order dated April 17, 1963 dismissing the aforesaid protest of the Secretary of the Army to the Centrex tariffs. The order is marked Exhibit 43 (26850-26853).

44. On March 25, 1964, the Chancery Court at Nashville, Tennesee, acting upon the petition of the Secretary of the Army for a writ of certiorari against the members of the Tennessee Public Service Commission and Southern Bell, denied the petition and affirmed the findings and conclusions of the Commission. The memorandum

decision of the Court, the order denying the petition, the decree denying a subsequent petition for a rehearing, a modification of that decree, and a consent order of dismissal of an appeal to the Supreme Court of Tennessee at Nashville are marked as Exhibits 44A through 44E.

45. The Judge Advocate General of the Army of the United States on behalf of the Department of Defense and other executive agencies of the United States Government filed a complaint dated July 12, 1962 with the Louisiana Public Service Commission with respect to the Centrex tariffs filed by Southern Bell in Louisiana. The complaint is marked Exhibit 45 (26832-26839). No action was taken to prosecute this complaint.

46. A copy of a letter dated September 5, 1963 and marked Exhibit 46A (13463) from Lewis W. Thomas, Jr., Chief, CSA Management Branch of the Ground Electronics Engineering - Installation Agency of the United States Air Force to the Kansas State Corporation Commission was received by S.W. Bell. The letter dated September 9, 1963 and marked Exhibit 46B (13468-13469) was sent by Thomas to S.W. Bell.

47. The Administrator of the General Services Administration ("GSA") of the United States filed with the New York Public Service Commission a Petition for Investigation dated February 14, 1963 with respect to the tariffs of N.Y. Tel. for Centrex service. The petition is marked Exhibit 47 (11891-11894).

48. N.Y. Tel. filed with the New York Public Service Commission an answering statement dated April 29, 1963 asking that GSA's petition be dismissed. The answering statement is marked Exhibit 48 (11897-11938).

49. The decision marked Exhibit 49A (11956-11957) was adopted by the New York Public Service Commission on June 26, 1963. By order of June 26, 1963 marked Exhibit 49B (11955), that Commission dismissed the petition and by order dated September 10, 1963, marked Exhibit 49C (11978), denied rehearing.

50. The sheet dated September 8, 1964 and marked Exhibit 50 (12069) was apparently prepared by an employee of N.Y. Tel.

51. On January 9, 1964 GSA commenced, with the service of a notice of petition and petition, a proceeding in the Supreme Court of the State of New York, Albany County, against the members of the New York Public Service Commission and N.Y. Tel. pursuant to the New York CPLR Article 78. The notice of petition and petition are marked Exhibit 51A (11979-11984). The Supreme Court of the State of New York rendered a memorandum decision dated July 17, 1964 and marked Exhibit 51B (12050-12055), and entered an order dated August 24, 1964 and marked Exhibit 51C (12057-12058).

52. In response to a request by the New York Public Service Commission, N.Y. Tel. submitted a letter dated November 4, 1964 together with a folder entitled "Centrex Costs and Rates". The letter and folder are marked Exhibit 52 (12084-12115).

53. On November 9, 1965 the New York Public Service Commission approved the report of its Telephone Bureau dated October 29, 1965 (12320-12346) and issued an order confirming the Public Service Commission's prior order dismissing GSA's complaint. The order and report are marked Exhibit 53 (12318-12319).

54. The memorandum dated January 16, 1962 and marked Exhibit 54 (09976-09977) was prepared by Carl E. Erickson, Tax Accountant in the Comptroller's Department of AT&T.

55. The memorandum dated January 31, 1962 and marked Exhibit 55A (10054) was sent to Alexander L. Stott, Vice President and Comptroller of AT&T, and was signed by H. A. Snyder, Assistant Comptroller of AT&T. The handwriting on the memorandum reading "Mr. Bolenius. I think we should pursue this idea to get the excise tax removed from special communications services (private line, telpak) for competitive reasons. If you agree will go ahead. ALS" is apparently that of Alexander L. Stott. The handwriting on the memorandum reading "Yes. WCB" is apparently that of W. C. Bolenius, Vice Chairman of the Board of AT&T. Memoranda dated January 30, 1962 are marked Exhibit 55B (10055-10058).

56. The document dated February 26, 1962 and marked Exhibit 56 (10051) was prepared by Frank L. Fuller, III, Tax Attorney in the office of the General Tax Attorney of AT&T. The sentence in the memorandum reading "Foulis will discuss legislation privately and discreetly with W&M committee or staff member in near future with advance notice to us if possible" refers to Ronald J. Foulis, an Attorney in the Washington office of AT&T. "W&M" refers to the Ways and Means Committee of the United States House of Representatives.

57. The memorandum dated June 29, 1962 and marked Exhibit 57 (10277) was sent by H. A. Snyder to Alexander L. Stott.

58. The memorandum dated March 18, 1963 and, with attachments, marked Exhibit 58 (15073-15076), came from files maintained by Ronald J. Foulis.

59. The memorandum dated August 29, 1963 with attachment and marked Exhibit 59 (10418-10427) was sent to Victor E. Ferrall, General Tax Attorney of AT&T, by H. A. Snyder. The handwriting in the upper right hand corner of the memorandum dated August 29, 1963 (10418) is that of Victor E. Ferrall.

60. The memorandum dated January 3, 1964 and marked Exhibit 60 (15077-15078) was sent by Ronald J. Foulis to John G. Fox, an Attorney in the Washington office of AT&T.

61. The memorandum dated February 7, 1964 with attachment and marked Exhibit 61 (00222-00224) was sent by H. A. Snyder to Victor E. Ferrall.

62. The memorandum dated February 13, 1964 and marked Exhibit 62 (10456-10457) was found in the files of the General Tax Attorney's Office of AT&T.

63. The handwritten document dated April 8, 1964 and marked Exhibit 63 (10479) was prepared by Frank L. Fuller, III and deals with a meeting attended by Robert D. Weber, Carl E. Erickson, George Fielding and Frank L. Fuller, III. The text reads:

> "Agreed:
>
> 1. Aim is to relieve or eliminate tax burden from competitive services. Forget across the board tax reduction even on a gradual basis.
>
> 2. Competitive services:
>
>   a. Private line -- including Plan A switched service.
>
>   b. WATS -- everyone may soon have statewide WATS in effect as local flat rate service areas expand statewide (as in Rhode Island, for instance).
>
>   c. Centrex-packaged as a service rather than as machinery in separate pieces.

d. PBX, Centrex CO & Centrex CU should be treated the same.

e. Tax only main station service."

64. The memorandum dated March 16, 1964 and marked together with attachments Exhibit 64 (10466-10471) was sent by Victor E. Ferrall to H. P. Moulton, Vice President and General Counsel of AT&T.

65. The document dated August 1964 and entitled "Excise Tax on Communication Services", which is marked Exhibit 65 (00001-00030), is a statement submitted by A. L. Stott at hearings before the Committee on Ways and Means of the United States House of Representatives.

66. Ronald J. Foulis prepared the memorandum marked Exhibit 66A (15071-15072). The memorandum marked Exhibit 66B (15093-15095) came from files maintained by Ronald J. Foulis.

67. The memorandum dated October 7, 1964 (10644-10646) was apparently prepared by Carl E. Erickson. The memorandum (together with its attachments 10647-10658) is marked Exhibit 67.

68. By, on or about October 19, 1964 there had been prepared by the Office of the General Tax Attorney of AT&T drafts bearing that date of possible legislation marked as the following exhibits:

Draft	Exhibit
Draft A (10736-10745)	68A
Draft B (10746)	68B
Draft C (10747)	68C
Draft D (10767)	68D
Draft E (10764-10765)	68E
Draft I (10748-10749)	68F

Draft II (10750)	68G
Draft III (10751)	68H
Draft IV (10752)	68I
Draft V (10753)	68J

69. The document marked Exhibit 69 (10899-10906) is a three-column document prepared by AT&T and submitted by AT&T in November 1964 to, among others, personnel from the Department of the Treasury and from the Staff of the Joint Committee on Internal Revenue Taxation.

70. The memorandum entitled "Summary of Revenue Effects of Drafts A and C Estimated Calendar 1965 Basis," dated October 22, 1964 with attachments and marked Exhibit 70 (10822-10824), was prepared by Carl E. Erickson.

71. The memorandum entitled "Notes on Draft A of Excise Tax Legislative Language," dated October 22, 1964 and marked Exhibit 71A (10825), was prepared by Carl E. Erickson. The memorandum entitled "PBX Packaging" dated October 21, 1964 and marked Exhibit 71B (10826) came from the files of AT&T.

72. Frank L. Fuller, III made contemporaneous notes regarding some of the statements made at a conference held on November 9, 1964 at the New House Office Building, Washington D.C. between personnel of AT&T and personnel from the United States Department of the Treasury, Internal Revenue Service, and Staff of the Joint Committee on Internal Revenue Taxation, which are marked Exhibit 72A (10890-10898). A typewritten copy of the notes is marked Exhibit 72B. "Draft A" referred to in the notes is marked Exhibit 68A, supra.

73. The letter dated November 25, 1964 and attached Statement 1, marked Exhibit 73 (00270-00275),

were sent by Victor E. Ferrall to L. N. Woodworth, Chief of Staff of the Joint Congressional Committee on Internal Revenue Taxation.

74. The letter dated December 4, 1964 which, together with its sixteen page attachment, is marked Exhibit 74 (18437-18453) was sent by Victor E. Ferrall to L. N. Woodworth.

75. The memorandum dated December 10, 1964 with attachment marked Exhibit 75 (00303-00307) was prepared for Victor E. Ferrall by Ernest R. Charvat, Tax Attorney in the Office of the General Tax Attorney of AT&T.

76. The letter dated December 17, 1964 and marked Exhibit 76 (00294-00302) was sent by Victor E. Ferrall to L. N. Woodworth, Chief of Staff of the Joint Congressional Committee on Internal Revenue Taxation.

77. The undated memorandum marked Exhibit 77 (15096) was prepared by Ronald J. Foulis.

78. The letter dated December 29, 1964 with attachment and marked Exhibit 78 (12897-12898) was sent by Robert D. Weber, Exchange Rate Supervisor of AT&T, to persons concerned with exchange rate matters at several defendant operating companies including SNET, P.N.W. Bell, Illinois Bell, Pacific Tel. and C&P. The handwriting reading "2/9/65 Told Weber we could go along if no better alternative though not wholly desirable" on the letter dated December 29, 1964 and marked Exhibit 78, supra, is that of W. H. Robb, Assistant Vice President-Revenue Requirements of SNET.

79. The letter dated December 29, 1964 marked Exhibit 79 (03313-03314) was sent by Robert D. Weber to Hi

Boyles, General Commercial Engineer of S.W. Bell. The handwriting reading "Howard and I discussed with Bob and told him we did not care for the Centrex plan. HDB" is that of Hi Boyles.

80. The memorandum dated January 12, 1965 and marked Exhibit 80 (08052) was sent by L. R. Stang, General Rate Engineer of Illinois Bell, to G. W. Trout, Assistant Vice President of Illinois Bell.

81. The memorandum dated January 14, 1965 and marked Exhibit 81 (15756) is initialed by Wayne Shipley, Special Facilities Supervisor of P.N.W. Bell, and the other handwriting on the memorandum is that of Wayne Shipley. The reference to "195" is to the head office of AT&T which was at 195 Broadway, New York, New York.

82. The memorandum dated January 25, 1965 and marked Exhibit 82 (15757) is in the handwriting of Wayne Shipley. As of that date, Scott Shepherd was a Staff Representative in the Rate Planning Division of AT&T and reported to Robert D. Weber.

83. The memorandum dated February 3, 1965 and marked Exhibit 83 (06645) was sent by W. G. Butler, General Staff Supervisor of C&P, to Richard DeButts, Assistant Vice President for Revenue Requirements of C&P. The handwriting on the memorandum reading "Thanks very much. I reviewed our comments with Mr. Weber today. 2-9-65." is that of Mr. DeButts.

84. The memorandum dated May 11, 1965 with attachments marked Exhibit 84 (11023-11032) was sent by A. L. Stott to Frederick R. Kappel, Chairman of the Board of AT&T.

85. The memorandum marked Exhibit 85 (11075-

11076) was prepared on or about May 14, 1965 by Victor E. Ferrall and Ronald J. Foulis for Frederick R. Kappel in preparation for a projected conference with Congressman Wilbur D. Mills, Chairman of the House Ways and Means Committee.

86. The memorandum (11033) on the letterhead of Ronald J. Foulis reading "Rec'd 5/11/65" was prepared in the Washington office of AT&T and the attached document (11034-11036) was received on or about May 11, 1965. The memorandum and document are marked Exhibit 86.

87. The handwriting on the document marked Exhibit 87 (11037-11039) is that of Victor E. Ferrall.

88. The draft dated May 12, 1965 and marked Exhibit 88 (11050) was found in the files of the Office of the General Tax Attorney of AT&T.

89. The document marked Exhibit 89 (11054-11060) was found in the files of the General Tax Attorney's Office of AT&T.

90. The document marked Exhibit 90 (11196-11197) is in the handwriting of Victor E. Ferrall.

91. The document dated May 20, 1965 and marked Exhibit 91 (11092) was apparently typed by the secretary to Victor E. Ferrall, and the handwritten note reading "Advised Woodworth by tel. 5/20/65 that o.k. with either of these changes" is apparently in the handwriting of Victor E. Ferrall.

92. The memorandum and attached document dated May 24, 1965 and marked Exhibit 92 (11093-11094) was apparently typed by the secretary to Victor E. Ferrall.

93. Excerpts of the reports of the House Committee on Ways and Means and of the Senate Finance Committee

with respect to the Excise Tax Reduction Act of 1965 are marked Exhibit 93 (11113-11122, 11124-11127).

94. Excerpts purporting to be quoted from the message of President Lyndon B. Johnson delivered May 17, 1965 to Congress proposing cuts in Federal Excise Taxes are marked Exhibit 94 (11107-11109).

95. A purported transcript of the remarks of President Lyndon B. Johnson on signing the Excise Tax Reduction Act of 1965 is marked Exhibit 95 (11130-11133).

96. The letter dated January 28, 1966 marked Exhibit 96 (00134-00135) was sent by A. L. Stott to Congressman Wilbur D. Mills.

97. The letter dated February 25, 1966 and marked Exhibit 97 (04742-04743) was sent by A. L. Stott to Senator Russell B. Long, Chairman of the United States Senate Finance Committee.

98. The letter dated August 10, 1967 and marked Exhibit 98 (00139-00140) was sent by H. I. Romnes, Chairman of the Board of AT&T, to Congressman Wilbur D. Mills.

99. The letter dated February 6, 1968 and marked Exhibit 99 (00141) was sent by H. I. Romnes to Congressman Wilbur D. Mills.

100. The letter dated May 21, 1969 and marked Exhibit 100 (00142) was sent by A. L. Stott to Congressman Wilbur D. Mills.

101. The document dated September, 1970 and marked Exhibit 101 (00143-00148) is a statement submitted by R. N. Flint to the Committee on Ways and Means of the United States House of Representatives.

102. The letter dated June 21, 1965 (00054-00055)

with attached list (00056-00062) marked Exhibit 102 were sent by Victor E. Ferrall to the General Counsel of all the defendant operating companies.

103. The letter dated June 23, 1965 (00917-00918) with attached list (00919-00925) marked Exhibit 103 was sent by R. N. Flint, Assistant Comptroller of AT&T, to the Comptrollers of all the defendant operating companies.

104. The letter dated July 1, 1965 (00031) with enclosed memorandum (00032-00053) marked Exhibit 104 was sent by Victor E. Ferrall to the General Counsel of all the defendant operating companies.

105. The letter dated September 3, 1965 and marked Exhibit 105 (09283-09284) was sent by R. N. Flint to the Comptrollers of all the defendant operating companies.

106. The memorandum dated September 3, 1965 and marked Exhibit 106 (14775-14777), including a 2-page attachment, was sent by Victor E. Ferrall to the General Counsel of all defendant operating companies.

107. The letter dated September 27, 1965 and marked Exhibit 107 (00063-00064) was sent by R. N. Flint to the Comptrollers, General Commercial Managers and Marketing Department Managers of all the defendant operating companies.

108. The document entitled "Conference on Communications Taxes" marked Exhibit 108A (14778-14880) was prepared by the Comptroller's Department of AT&T and copies of the Exhibit or similar documents, including the document marked as Exhibit 108B (00065-00083), were distributed to the conferees at meetings referred to in the Exhibit held October 6 and 7, 1965 and October 13 and 14, 1965 at New York, New York.

109. The document entitled "Excise Tax Meeting-Consolidated Minutes-Rate Group-October 7 & 14, 1965" marked Exhibit 109 (17100-17101) was probably prepared by Scott Shepherd and was sent by him to at least one defendant operating company.

110. The document entitled "Bell System Conference on Excise Tax Law - Minutes of N. Y. Meeting - October 6, 7, 1965" and marked Exhibit 110 (17092-17098) consists of a subsequent typewritten transcription of the contemporaneous notes made at various meetings during such conference by G. J. Hartman, Rate Supervisor - Tariff Administration of Pennsylvania Bell. The references in the notes to proper names are as follows:

Flint:	R. N. Flint, Assistant Comptroller of AT&T
Gallagher:	J. F. Gallagher, Commercial Methods Supervisor of AT&T
Charvat:	E. R. Charvat, Tax Attorney, AT&T's Office of General Tax Attorney
Schultz:	R. M. Schultz, Marketing Analysis Supervisor of AT&T
Shepherd:	Scott Shepherd, a Staff Representative in the Rate Planning Division of AT&T
Rathka:	R. A. Rathka, Tax Accountant in the Comptroller's Department of AT&T
Erickson:	C. E. Erickson, Supervising Tax Accountant in the Comptroller's Department of AT&T
Parrish:	B. R. Parrish, Data Systems Representative in the Comptroller's Department of AT&T
Conley:	M. C. Conley, Product Analysis Supervisor in Marketing Department of AT&T

Popp:	R. H. Popp, Tax Accountant in Comptroller's Department of AT&T
Mallory:	Mrs. M. C. Mallory, Attorney, Legal Department, N.Y. Tel.
Cahill:	F. E. Cahill, General Research Supervisor, Pacific Tel.

The references in the notes to "CTX" are to "Centrex."

111. The document marked Exhibit 111 (22870-22882) consists of the contemporaneous notes made by R. Norman Anderson of the Comptroller's Department of Wisconsin Telephone at various meetings during the conference on Communications Taxes held October 6 and 7, 1965, at New York, New York.

112. The memorandum dated October 11, 1965 and marked Exhibit 112 (30228-30236) was sent by F. E. Cahill, General Research Supervisor of Pacific Tel., to R. M. Joses, and R. H. Hartsough, Jr., Assistant Comptroller and Assistant Vice President, respectively, of Pacific Tel., and to J. A. Sutro, a member of the law firm of Pillsbury, Madison & Sutro.

113. The document marked Exhibit 113 (20507-20522) was prepared by an employee of Mountain States.

114. The letter dated October 28, 1965 and marked Exhibit 114A (13245) was sent by R. N. Flint, Assistant Comptroller of AT&T, to the Comptrollers of all the defendant operating companies. Attached to the letter were Parts 1 through 5 and Appendices A and B of the manual entitled "Federal Excise Tax on Communication Services," a later copy of which is marked Exhibit 114B (13246-13340).

115. The document marked Exhibit 115 (09289-09305) consists of excerpts from "Tax Talk," a weekly publication prepared and issued by the General Tax Section of the Comp-

troller's Department of AT&T and sent to various persons in all the defendant operating companies.

116. The memorandum dated November 19, 1965 with attachment and marked Exhibit 116 (04976-04977) was prepared by W. H. Olson, an Accountant in N.W. Bell, down to the signature and telephone number on 04976.

117. The document dated August 19, 1968 and marked Exhibit 117A (04085-04086) entitled "Tax Talk" was sent by the General Tax Section of the Comptroller's Department of AT&T to various persons in all defendant operating companies. The revised manual referred to in the document and marked Exhibit 117B (14997-15066) was sent to all defendant operating companies on January 28, 1969.

118. The issue of "Tax Talk" dated May 25, 1970 and marked Exhibit 118 (04107-04108) was prepared by the General Tax Section of the Comptroller's Department of AT&T and sent to various persons in each of the defendant operating companies.

119. The issue of "Tax Talk" dated June 14, 1971 and marked Exhibit 119 (04109-04111) was prepared by the General Tax Section of the Comptroller's Department of AT&T and sent to various persons in each of the defendant operating companies.

120. The memorandum dated May 11, 1966, entitled "Taxation of Centrex Systems under Federal Communications Excise Tax Law," and marked Exhibit 120 (17123-17125) was prepared by the General Accounting Supervisor-Taxes of Pennsylvania Bell.

121. The document dated September, 1968 marked Exhibit 121 (39371-39416) was prepared by William H. Doughty of the Switching Systems Rate Plans Group of AT&T.

122. The letter dated February 3, 1969 marked Exhibit 122 (39417-39419) was sent by R. T. Dugan, Assistant Vice President of AT&T--Marketing and Rate Plans--Exchange Services to the Rate and Marketing Heads of all of the defendant operating companies.

123. The document dated November 13, 1969 with attachments was prepared by R. L. Marker of AT&T, and is marked as Exhibit 123 (39420-39427).

124. The letter dated August 16, 1965 and marked Exhibit 124 (00312) was sent by V. R. Schopp, Coordinator of Communications Services of American Oil Company, to Robert W. Johnson, a National Account Manager of Illinois Bell.

125. The memoranda dated June 8, 1966 and June 10, 1966 and marked Exhibit 125A (06426) were sent by Mrs. Marion C. Mallory, Attorney for N.Y. Tel., respectively, to E. R. Charvat and R. C. Hamer, in the Sales Department of N.Y. Tel. and Account Manager for Union Carbide Corporation. Attached to each of the memoranda was the typewritten portion of the draft dated June 8, 1966 and marked Exhibit 125B (06431-06434).

126. The memorandum dated June 13, 1966 marked Exhibit 126 (06435) was sent by E. R. Charvat to Robert D. Weber with a copy to Marion C. Mallory.

127. The letter dated June 15, 1966 with attached draft marked Exhibit 127 (06427-06430) was sent by E. R. Charvat to Marion C. Mallory.

128. The memorandum dated June 22, 1966 (06440)

with the attached draft dated June 20, 1966 (06436-06439) marked Exhibit 128 was sent by Mario[illegible]allory, Attorney for N.Y. Tel., to C. A. Daley, W. B. Garvey and E. H. Munz, respectively, a General Rate Engineer, General Revenue Requirements Supervisor and General Marketing Engineer of N.Y. Tel.

129. The memorandum dated June 24, 1966 and marked Exhibit 129 (06441) was sent by E. H. Munz, General Marketing Engineer of N.Y. Tel., to Marion C. Mallory. The handwriting reading "Mr. Garvey thinks letter o.k. as presented to him 6/27" is apparently that of Marion C. Mallory. The handwriting reading "talked to Cy who feels U.C. knows the score--thinks some reference should be made to Sen. & House reports. I suggested deleting quote but making reference to reports. Cy concurs with this. 6/28" is apparently that of Marion C. Mallory. The reference to "Cy" is to C. A. Daley, and the reference to "U.C." is to Union Carbide.

130. The typewritten portion of the letter dated July 14, 1966 marked Exhibit 130 (00318-00321) was sent by Marion C. Mallory to D. W. Morrison, Manager-Business Services of Union Carbide Corporation.

131. The letter dated January 30, 1967 marked Exhibit 131 (02010) from E. J. Renfro, Manager, Communications of Monsanto Company ("Monsanto"), was received by H. L. Engelmann, Account Manager for Monsanto at S.W. Bell.

132. The memorandum dated February 22, 1967 marked Exhibit 132 (02019) was sent by the General Commercial Manager-St. Louis of S.W. Bell to the Commercial Operations Engineer-St. Louis and General Merchandising Manager-St. Louis of S.W. Bell.

133. The memorandum dated March 1, 1967 marked Exhibit 133 (02020) was sent by the General Merchandising Manager-St. Louis and the Commercial Operations Engineer-St. Louis of S.W. Bell to the General Commercial Manager-St. Louis of S.W. Bell.

134. The memorandum dated March 8, 1967 marked Exhibit 134 (03319) was contained in the files of S.W. Bell.

135. The memorandum dated March 14, 1967 with attachment marked Exhibit 135 (03320-03325) was signed by someone for the General Merchandising Manager-St. Louis of S.W. Bell and sent to the General Commercial Manager-St. Louis of S.W. Bell.

136. The letter dated March 28, 1967 marked Exhibit 136 (03326) was signed by T. B. Luzon, a Market Planning Administrator of AT&T, and sent to Ben Smith, a General Merchandising Manager of S.W. Bell.

137. The letter dated June 15, 1967 marked Exhibit 137 (02027-02028) from E. J. Renfro was received by H. L. Engelmann.

138. The memorandum dated June 16, 1967 marked Exhibit 138 (02030) was sent by William O. Douglass, District Sales & Service Manager-Creve Coeur of S.W. Bell, to the Division Sales & Service Manager-East Sales of S.W. Bell.

139. The memoranda dated June 6, 1967 and marked Exhibit 139 (07345) was signed by F. M. Chapman for the General Commercial Manager-Topeka of S.W. Bell, and sent to the General Accounting Manager-Topeka, Division

Manager-Topeka, Division Manager-Wichita and General Sales and Service Manager-Topeka of S.W. Bell.

140. The memorandum dated June 9, 1967 with attachment, and marked Exhibit 140 (07348-07355) was prepared for the signature of Krucker Johnson, the Chairman of the Centrex Committee for S.W. Bell, and sent to the S.W. Bell General Commercial Manager-Topeka.

141. The memorandum dated July 11, 1967 marked Exhibit 141 (03327) was signed by H. E. Jones, General Merchandising Manager of S.W. Bell, and sent to the General Commercial Manager-St. Louis of S.W. Bell.

142. The original of the letter dated August 4, 1967 marked Exhibit 142 (02033) was sent by H. L. Engelmann to E. J. Renfro. The handwriting on the bottom right of the page is apparently Engelmann's and apparently reads: "Call from chief attorney-Explained we could do nothing at this time-Suggested he contact tax people [word illegible] to have law changed. HLE"

143. The memorandum dated June 12, 1968 and marked Exhibit 143 (17166-17167) was sent by G. J. Hartman, Rate Supervisor-Tariff Administration of Pennsylvania Bell, to B. L. Agnew, General Marketing Supervisor-Eastern Area of Pennsylvania Bell.

144. The letter dated August 22, 1968 and marked Exhibit 144 (06415-06416) was received by J. Curren, Account Manager-Mobil Oil of N.Y. Tel., from A. T. Wacker, Manager, Communications, Mobil Oil Corporation. The handwriting which apparently reads "Talked to Mr. Charvat (AT&T) as to position of Bell System - Any chance of tariff change so that more advantageous tax treatment can apply - Mr. C. says no - tariff

people aren't about to change. - Accting advised. M.C.M. 10/3/68" is apparently that of Marion C. Mallory, Attorney, Legal Department, N.Y. Tel.

145. The handwritten note dated February 28, 1969 and marked Exhibit 145A (06411) was sent to P. Wagner, General Tax Attorney of N.Y. Tel., together with the draft marked Exhibit 145B (06412).

146. The letter dated April 8, 1969 and marked Exhibit 146 (06394-06396) was sent to A. T. Wacker by J. Curren.

147. The letter dated April 8, 1968 and marked Exhibit 147 (33371) was received by Robert M. Fehlen, Communications Consultant of Ohio Bell, from Bruce C. Williams, Office Manager of Owens-Corning Fiberglas Corp.

148. The memorandum dated May 27, 1968 and marked Exhibit 148 (33372) was sent by R. F. Lynd, a Marketing Supervisor of Ohio Bell, to E. D. Clouse, a Division Sales Manager of Ohio Bell.

149. The letter dated June 26, 1968 and marked Exhibit 149 (33373) was received by E. D. Clouse from Bruce L. Williams.

150. The memorandum dated August 12, 1968 and marked Exhibit 150 (33374-33375) was sent by John T. Alter, a Sales Manager of Ohio Bell, to E.D. Clouse.

151. The copy of the document marked Exhibit 151 (33367-33370) was sent by C. F. Hurd, Supervising Accountant, Taxes of Ohio Bell, to H. C. Luppens, Assistant Commercial Supervisor, Rates of Ohio Bell, on or about November 14, 1968.

152. The memorandum dated May 14, 1969 and marked Exhibit 152 (33376-33379) was sent by E. D. Clouse to W. E. Mirre, a Division Sales Manager of Ohio Bell.

153. The memorandum dated March 7, 1967 and marked Exhibit 153 (17117) was sent by G. H. Ruschhaupt, an Assistant Vice President of Pennsylvania Bell, to J. F. Hulihan, General Marketing Manager-Central Area of Pennsylvania Bell.

154. The memorandum marked Exhibit 154 (17163) was sent by W. Wohlhagen, General Rate Supervisor-Administration of Pennsylvania Bell, to G. H. Ruschhaupt, an Assistant Vice President of Pennsylvania Bell, in July, 1967. The handwriting reading "Mr. Wohlhagen. As per our discussion will you please follow again? R 8/17-67" is that of G. H. Ruschhaupt.

155. The memorandum dated October 18, 1971 and marked Exhibit 155 (08124) was prepared for C. W. Ebersold and G. W. Trout.

156. The memorandum dated November 4, 1971 which, together with its two-page attachment, is marked Exhibit 156 (17281-17283), was sent by G. H. Ruschhaupt, an Assistant Vice President of Pennsylvania Bell, to the General Marketing Managers of Pennsylvania Bell for the Philadelphia Area, Eastern Area, Central Area and Western Area.

157. The memorandum dated June 28, 1968 and marked Exhibit 157 (17021-17022) was prepared by W. W. Horn, Jr., an Account Manager of Diamond State.

158. The documents marked Exhibit 158 (34944-34950) were prepared by Pacific Tel. and were submitted by Pacific Tel. to the California Public Utilities Commission.

159. The letter dated December 12, 1967 which, together with the attached three-page memorandum dated December 17, 1967, is marked Exhibit 159 (00324-00327), was sent by Joseph M. Shotz, District Director of the IRS, to N.J. Bell.

160. The letter dated January 25, 1968 with its attachments and marked Exhibit 160 (11207-11218) was sent by E. R. Charvat to Chauncey L. Barrett, an Attorney with N.J. Bell. The original of the attached letter and statement dated January 24, 1968 was sent by AT&T's General Tax Attorney's Office to Joseph M. Shotz, District Director of the IRS.

161. By a letter dated August 30, 1968 (11219), the Internal Revenue Service transmitted to N.J. Bell a copy of a technical advice memorandum prepared by the National Office of the Internal Revenue Service and dated August 8, 1968 (11220-11221). The letter dated August 30, 1968 and the technical advice memorandum dated August 8, 1968 are marked as Exhibit 161.

162. The issue of "Tax Talk" dated September 16, 1968 and marked Exhibit 162 (04087-04088) was prepared by the General Tax Section of the Comptroller's Department of AT&T and sent to various persons in each of the defendant operating companies. The technical advice memorandum referred to on page 04087 is the technical advice memorandum which constitutes part of Exhibit 161, supra.

163. The issue of "Tax Talk" dated April 14, 1969 and marked Exhibit 163 (04089-04091) was prepared by the General Tax Section of the Comptroller's Department of AT&T and sent to various persons in each of the defendant operating companies. The technical advice referred to on page 04090 is the technical advice memorandum which constitutes part of Exhibit 161, supra.

164. The memorandum dated November 3, 1967 and marked Exhibit 164 (02034) was signed by C. A. Carpenter for the General Sales and Service Manager-Houston of S.W. Bell, and sent to the managers and engineer of S.W. Bell set forth in the memorandum.

165. The memorandum dated September 10, 1968 and marked Exhibit 165 (02037) was sent by Don L. Smith, the Vice President-Staff of S.W. Bell, to E. G. Greber, Vice President-Operations of S.W. Bell.

166. The letter dated November 26, 1969 and marked Exhibit 166 (03339-03346) was sent by T. C. Rostron, Supervisor of Tax and Public Returns of S.W. Bell, to the District Director of Internal Revenue, St. Louis, Missouri.

167. The document marked Exhibit 167 (34952-34959) was prepared by S.C. Bell in April or May 1970 and submitted to the Louisiana Public Service Commission.

168. The document marked Exhibit 168 (35305-35308) is an excerpt from working papers that were prepared by J. Finney of C&P of Maryland.

169. The letter dated January 7, 1971 and marked Exhibit 169 (01905-01906) was sent by C. R. Mott, Jr., General Marketing Manager for the Tennessee Area of S.C. Bell, to G. W. Bates, Assistant Vice President-Commercial and Marketing of S.C. Bell.

170. The memorandum dated January 15, 1971 and marked Exhibit 170 (01908-01909) was sent by V. R. Martin, a Supervising Accountant of S.C. Bell, to F. C. Izard, Assistant Comptroller-Taxes of S.C. Bell.

171. The letter dated January 19, 1971 and marked Exhibit 171 (01912) was sent by George W. Bates, Assistant

Vice President-Commercial and Marketing of S.C. Bell, to J. W. Mitchell and F. C. Izard, Assistant Vice President-Planning and Rates and Assistant Comptroller-Taxes, respectively, of S.C. Bell.

172. The letter dated January 19, 1971 and marked Exhibit 172 (01913) was sent by George W. Bates to C. R. Mott, Jr.

173. The letter dated March 5, 1971 and marked Exhibit 173 (31513) was sent by W. O. McCoy, General Commercial Manager of S.C. Bell in the Tennessee Area, to C. R. Mott, Jr.

174. The memorandum dated February 16, 1971 and marked Exhibit 174 (14902) was sent by R. M. Sample, Bartlesville District Sales and Service Manager of S.W. Bell, to the office of the Area Service Engineer-Oklahoma City of S.W. Bell.

175. The letter dated March 23, 1971 and marked Exhibit 175 (14904) was sent by R. M. Sample to J. O. Mostrom, Manager-Electrical & Communications Division of Phillips Petroleum Company.

176. The letter dated April 29, 1971 and marked Exhibit 176 (03369) was sent by David Saali, Account Manager of S.W. Bell for McDonnell Douglas Corporation, to Robert D. Rice, Director-General Services of McDonnell Douglas Corporation.

177. The technical advice memorandum prepared by the National Office of the Internal Revenue Service and dated April 28, 1971 was transmitted to Southwestern Bell Telephone Company on May 6, 1971, and is marked as Exhibit 177 (00350-00355).

178. The memorandum dated May 4, 1971 and marked Exhibit 178 (08053) was sent by W. P. Campbell, a General

Rate Supervisor of Illinois Bell, to G. W. Trout, Assistant Vice President of Illinois Bell. The handwriting on the memorandum reading "Mr. Norlander-No relief here. T." is that of G. W. Trout. The reference to Mr. Norlander is to E. C. Norlander, General Marketing Manager of Illinois Bell.

179. The memorandum dated June 22, 1971 (08054) and the attached letter of June 11, 1971 (08055), which are marked Exhibit 179, were sent by W. P. Campbell to G. W. Trout.

180. The memorandum dated June 7, 1971 and marked Exhibit 180 (03395-03396) was sent by Robert D. Allen, General Attorney-Oklahoma of S.W. Bell, to the General Commercial Manager-Oklahoma of S.W. Bell.

181. On or about June 4, 1971, the memorandum dated June 4, 1971 and marked Exhibit 181 (06098-06101), was transmitted from the IRS National Office to the IRS District Director, Manhattan District Office.

182. The memorandum dated June 1, 1971 with attachment and marked Exhibit 182 (30539-30544) was sent by F. M. Widener, Regulatory Representative of Pacific Tel., to H. D. Brown, General Tax Accountant of Pacific Tel. The reference in the memorandum to "CPUC" is to the California Public Utilities Commission.

183. The memorandum dated June 17, 1971 with attachment and marked Exhibit 183 (04986-04988) was received by R. M. Kemp.

184. The memorandum dated June 9, 1971 and marked Exhibit 184 (30545-30548) was sent by H. D. Brown to, among others, F.M. Widener, Regulatory Representative of Pacific Tel., and Carl E. Erickson and Harold A. Tindall.

185. The handwritten notes dated June 10, 1971 and marked Exhibit 185 (30552) were made by R. L. Bowers, a Pricing Analyst of Pacific Tel., and refer to a telephone conversation of R. L. Bowers with T. J. Burkinshaw.

186. The letter dated June 11, 1971 and marked Exhibit 186 (04754) was sent by Richard M. Smith, Assistant Vice President-Marketing of Illinois Bell, to R. T. Dugan, Assistant Vice President of AT&T.

187. The memorandum dated June 10, 1971 and marked Exhibit 187 (04746) was signed by R. M. Kemp for J. B. O'Boyle and sent to R. T. Dugan. The handwriting on the memorandum reading "Mr. Bonsack, We will have more on this soon. R.T.D. 6/11" is that of R. T. Dugan. The handwriting on the memorandum reading "Mr. Dugan, Thanks - S.E.B. 6/15" is that of Samuel Bonsack, Vice President of AT&T.

188. The memorandum dated June 11, 1971 and marked Exhibit 188 (03406) was sent by J. E. Keith, Commercial Operations Engineer of S.W. Bell, to W. H. Bowen, Jr., Vice President-Staff of S.W. Bell.

189. The letter dated June 11, 1971 with attachment and marked Exhibit 189 (03410-03417) was sent by W. H. Bowen, Jr. to R. T. Dugan.

190. The memorandum dated June 15, 1971 with attachment and marked Exhibit 190 (04777-04778) was sent by R. T. Dugan to J. B. O'Boyle with a copy to Victor E. Ferrall.

191. The letter dated June, 1971 and marked Exhibit 191 (00149) was drafted to be signed by R. T. Dugan and to be sent to Richard M. Smith, Assistant Vice President-Marketing of Illinois Bell.

192. The letter dated June 18, 1971 and marked Exhibit 192 (04794) was sent by R. T. Dugan to W. H. Bowen, Jr.

193. The memorandum dated August 19, 1971 with attachment and marked Exhibit 193 (03450-03456) was produced from the files of S.W. Bell but was not prepared in S.W. Bell.

194. The memorandum dated August 12, 1971 and marked Exhibit 194 (04800) was signed by Cyrus J. Halpern and sent to Victor E. Ferrall.

195. The memorandum dated August 17, 1971 and marked Exhibit 195 (17151-17152) was sent by Thomas A. Everly, an Attorney with Pennsylvania Bell, to P. F. Pugliese, General Solicitor of Pennsylvania Bell. The handwritten notation on the upper right corner of the first page of the memo (17151) was entered by P. F. Pugliese on August 20, 1971 and reads: "I discussed the tax aspects of this proposal with Mr. Ferrall and he concurs in our conclusion that the proposed separation of the Exchange Access and Intercommunication charges and the application of F.E.T. only to the Exchange Access charges is proper under the Code. P.F.P. 8/20/71."

196. The memorandum dated May 16, 1971 and marked Exhibit 196 (17182-17183) was written on August 16, 1971 (and is misdated) and sent on that date by A. X. Ichter, Rate Supervisor-Switching Systems and Channels of Pennsylvania Bell to W. J. Wohlhagen, General Rate Supervisor-Administration of Pennsylvania Bell. The memorandum describes an August 12, 1971 meeting.

197. The memorandum dated September 10, 1971 and marked Exhibit 197 (17184) was sent by G. H. Ruschhaupt,

an Assistant Vice President of Pennsylvania Bell, to E. S. Gill, the Vice President-Marketing of Pennsylvania Bell.

198. The memorandum dated September 15, 1971 and marked Exhibit 198 (04833) was written by Robert M. Kemp, was signed by W. J. Rinkor and was sent by Rinkor to Richard T. Dugan. The handwritten notation on the bottom right corner apparently reads: "Called Ichter he will mail pertinent documents to me today 9-15."

199. The memorandum with the handwritten date "September 27, 1971" which, together with its six-page attachment, is marked Exhibit 199 (17188-17196) was sent by E. S. Gill, Vice-President-Marketing of Pennsylvania Bell, to the Vice Presidents and General Managers of Pennsylvania Bell for the Eastern Area, Western Area, Central Area, and Philadelphia Area.

200. The letter dated September 27, 1971 with attachments and marked Exhibit 200 (00150-00168) was sent by R. T. Dugan to the Rate Heads and Marketing Heads of all the defendant operating companies.

201. The memorandum dated January 19, 1972 with attachment and marked Exhibit 201 (17569-17581) was sent by P. D. Loser, Assistant Vice President of AT&T, to the General Commercial Managers of all the defendant operating companies.

202. The memorandum dated March 23, 1972 with attachment and marked Exhibit 202 (00179-00190) was sent by R. G. Zender, Assistant Comptroller of AT&T, to the Comptrollers of all the defendant operating companies.

203. The memorandum dated January 6, 1972 and marked Exhibit 203 (04958-04959) was sent by Victor E. Ferrall to R. T. Dugan.

204. The memorandum dated November 21, 1972 and marked Exhibit 204 (00468-00470) was prepared and sent by Harold A. Tindall to Cyrus J. Halpern. The handwriting on the first page (00468) is Mr. Tindall's and reads: "Copies to: V. Gomperts A. Walton 11/21 HAT."

205. The memorandum dated May 9, 1972 and marked Exhibit 205A (00426) was sent by Carl E. Erickson to Cyrus J. Halpern. The "Telephony article" referred to in the memorandum is entitled "How McDonnell Douglas Corp. saved $100,000 a year on Centrex, without costing General of California a dime in lost revenue" and appeared in the May 1, 1972 issue of Telephony. A copy of the article is marked Exhibit 205B (00199-00200).

206. The memorandum dated January 30, 1972 and marked Exhibit 206 (19335) was prepared and circulated within the Rate Planning Division of C&P of Maryland.

207. The memorandum dated January 24, 1972 and marked Exhibit 207 (06675) was sent to B. R. Jacobs, the Assistant Vice President-Revenue Requirements-Rate Planning of C&P.

208. The handwritten memoranda marked Exhibit 208 (08142) were produced from the files of Illinois Bell. The handwriting reading "As Joe Johnson suggests, we need to understand the reasons, if any, for not doing this a long time ago. Did our careless delay cause additional expense to customers? When could we first have been expected to do it?" is that of Donald Sharp, Vice President and General Counsel of Illinois Bell, and was made in October 1971. The handwriting reading "Answers (not good ones) to Don's queries are in AT&T letter attached" is that of C. W. Ebersold, Vice President-Market Planning of Illinois Bell, and was

made on October 25, 1971. The AT&T letter referred to is the letter dated September 27, 1971 marked Exhibit 200.

209. The memorandum dated May 26, 1972 with attachment marked Exhibit 209 (00605-00610) was sent by J. Silvestri, General Rate Engineer of N.Y. Tel., to D. L. McSweeney, Assistant Vice President of N.Y. Tel.

210. The letter dated June 19, 1972 and marked Exhibit 210 (00616-00617) was sent by Raymond F. Scully, General Attorney of N.Y. Tel., to the Communications Division of the Public Service Commission of the State of New York.

211. The memorandum dated April 3, 1972 with attachment, marked Exhibit 211 (15139-15140) was sent by B. L. Brayton, Assistant Vice President of N.W. Bell, to W. E. Clemens, General Accounting Manager of N.W. Bell.

212. The letter dated April 7, 1972 and marked Exhibit 212 (15141) was sent by R. A. Ryerson, Assistant Vice President of N.W. Bell, to B. L. Brayton, Assistant Vice President of N.W. Bell.

213. The memorandum dated April 6, 1972 and marked Exhibit 213 (15272) was sent by W. M. Youngman, the General Rate and Tariff Supervisor of N.W. Bell, to Edward Sklenicka, the General Solicitor of N.W. Bell.

214. The memorandum dated April 10, 1972 and marked Exhibit 214 (15142) was sent by Edward Sklenicka, the General Solicitor of N.W. Bell, to W. M. Youngman, the General Rate and Tariff Supervisor of N.W. Bell.

215. The letter dated December 3, 1971 and marked Exhibit 215 (33380) was sent by N. P. Platt of Sears, Roebuck and Co. to George Preis of AT&T in Chicago, Illinois.

216. The memorandum dated February 14, 1972 and marked Exhibit 216 (09936) was sent by Roger E. Allen, Jr., a National Account Manager in the Long Lines Department of AT&T, to J. E. Stambaugh, National Account Coordinator, Long Lines Department of AT&T.

217. The letter dated February 15, 1972 and marked Exhibit 217 (11698) was sent by M. T. Gearhart, Manager, Communications Services, Bethlehem Steel Corporation, to R. K. Matthews, a National Account Manager of AT&T Long Lines.

218. The letter dated March 28, 1972 and marked Exhibit 218 (11699-11700) was sent by R. K. Matthews to M. T. Gearhart.

219. The letter dated April 25, 1972 and marked Exhibit 219 (06200) was sent by Roger E. Allen, Jr., National Account Manager-U.S. Steel of the Long Lines Department of AT&T, to C. W. Camack, a Rate Development Manager of N.Y. Tel.

220. The letter dated June 20, 1972 was signed by someone for B. F. Campbell, National Account Manager-Westinghouse of AT&T Long Lines, and sent to N.Y. Tel. (00618), S.W. Bell (02637), Illinois Bell (08180), Pennsylvania Bell (17284), and Pacific Tel. (30687). The letters are marked Exhibits 220A through 220E, respectively.

221. The letter dated November 12, 1971 and marked Exhibit 221 (25654) was sent by L. H. Calloway, General Forecast and Rate Supervisor (Florida) of Southern Bell, to C. H. Garity, Assistant Vice President of Southern Bell.

222. The letter dated December 1, 1971 and marked Exhibit 222 (20257) was sent by Allen F. Nelson, Manager-Office Services of RCA Data Processing Division, to C. M. Herrlein, an Accounts Manager of The Chesapeake & Potomac Telephone Company of Virginia.

223. The memorandum dated November 23, 1971 and marked Exhibit 223 (02225) was sent by the General Commercial Manager-Little Rock to the Commercial Operations Engineer-St. Louis and Marketing Operations Director-St. Louis of S.W. Bell.

224. The letter dated December 16, 1971 and marked Exhibit 224 (15301-15302) was sent by Gene R. Conner of Comtrol, Inc. to W. T. Todd, a District Sales Manager of N.W. Bell.

225. The memorandum dated December 9, 1971 and marked Exhibit 225 (03490) was signed by M. Kaiser for the General Marketing Manager-San Antonio of S.W. Bell, and sent to the General Commercial Manager-San Antonio of S.W. Bell.

226. The letter dated January 21, 1972 with attachment and marked Exhibit 226 (26911-26912) was sent by P. Q. Partee, Regional Manager-Communications of Eastern Air Lines, Inc., to R. J. Anthony, an Account Manager of Southern Bell.

227. The memorandum dated February 18, 1972 and marked Exhibit 227 (02155) was sent by J. C. Denneny, General Commercial Manager-Oklahoma of S. W. Bell, to R. D. Allen and C. Caldwell, respectively, General Attorney-Oklahoma and General Accounting Manager-Oklahoma of S.W. Bell.

228. The letter dated March 3, 1972 and marked Exhibit 228 (06402) was sent by F. M. Pelka, Manager-Telecommunications of Mobil Oil Company, to Vincent Flateley and J. M. Fastenau, both employed in the Sales Department of N.Y. Tel., and to George Wehler, a National Account Manager, in the Long Lines Department of AT&T.

229. The memorandum dated March 10, 1972 with attachments and marked Exhibit 229 (23532-23540) was prepared by G. C. Bullock, Rate Supervisor of N.J. Bell.

230. The letter dated May 6, 1972 and marked Exhibit 230 (01985-01986) was sent by Stuart M. Herbst, President of Telematics Associates, Inc., to W. C. Bauer, President of S.C. Bell.

231. The letter dated May 24, 1972 and marked Exhibit 231 (25803) was sent by David N. Smith, Specialist-Telecommunications of General Electric Company, to Leon Burke, an Account Manager of Southern Bell.

232. The letter dated May 26, 1972 and marked Exhibit 232 (00895) was sent by Patrick R. Edwards, Assistant to the President of Allied Stores Corporation, to Thomas A. Castellone, an Industry Sales Manager of N.Y. Tel.

233. The letter dated June 26, 1972 and marked Exhibit 233 (31564) was sent by Stuart M. Herbst, President of Telematics Associates, Inc., to W. C. Bauer, President of S.C. Bell.

234. The letter dated July 21, 1972 and marked as Exhibit 234 (15299) was sent by D. D. Dicken, Shop Auditor of John Deere Waterloo Tractor Works, to Jack Perry, an Account Representative of N.W. Bell.

235. The memorandum dated November 30, 1971 with attachment and marked Exhibit 235 (24005-24007) was sent by H. E. Gwillim, Assistant Vice President-Planning of Michigan Bell, to L. J. Haynes, Vice President-Planning of Michigan Bell.

236. The memorandum dated October 11, 1971 and marked Exhibit 236 (08123) was sent by H. F. Rolfe, Marketing Program Director-Business of Illinois Bell, to W. P. Campbell, a General Rate Supervisor of Illinois Bell.

237. The memorandum dated October 15, 1971 and marked Exhibit 237 (08127) was sent by W. P. Campbell to H. F. Rolfe.

238. The memorandum dated February 14, 1972 with attachment and marked Exhibit 238 (33363-33365) was sent by F. B. Harrison, a Division Marketing Manager of Ohio Bell, to J. R. Miller and W. E. Mirre, Division Sales Managers of Ohio Bell.

239. The memorandum dated March 10, 1972 and attachments and marked Exhibit 239 (19363-19371) were sent by H. W. Brown, General Marketing Supervisor of C&P, to the C&P Companies' General Marketing Supervisors and General Sales Managers set forth in the memorandum.

240. The memorandum dated July 3, 1972 with attachment and marked Exhibit 240 (01234-01238) was sent by C. R. Mott, Jr., General Marketing Manager of S.C. Bell for the Tennessee area, to the S.C. Bell Managers and Supervisor set forth in the memorandum.

241. The letter dated July 13, 1972 and marked Exhibit 241 (31552-31554) was sent by H. I. McBride, an Account Manager of S.C. Bell, to William C. Cothern, an employee of Commerce Union Bank, Nashville, Tennessee.

242. The memorandum dated August 18, 1972 with attachment and marked Exhibit 242 (15273-15292) was sent by W. M. Youngman, General Rate and Tariff Supervisor of N.W. Bell, to the N.W. Bell Supervisors set forth in the memorandum.

243. The letter dated September 5, 1972 with attachment and marked Exhibit 243 (25816-25817) was sent by A. H. Helms, a General Sales Manager of Southern Bell, to all

the District Marketing Managers of Southern Bell in North Carolina and to the Account Managers and Data Systems specialists set forth in the memorandum.

244. The memorandum dated October 3, 1972 with attachments and marked Exhibit 244 (13133-13141) was sent by J. J. McGouldrick, Marketing Supervisor-Sales Support of SNET, to SNET Account Managers, Marketing Managers and District Managers, and to the Division Managers whose names are set forth in the memorandum.

245. The memorandum dated April 7, 1972 and marked Exhibit 245 (02303) was signed by David L. Metz for the General Commercial Manager-Topeka of S.W. Bell, and sent to the General Marketing Manager-St.Louis of S.W. Bell.

246. The letter dated April 5, 1972 and marked Exhibit 246 (30688-30689) was sent by K. H. Fellows, Account Manager-Kaiser Companies of Pacific Tel., to J. Sydney Whalen, Controller of Kaiser Services.

247. The memorandum dated March 10, 1972 with attachment and marked Exhibit 247 (12951-12957) was prepared by W. B. Susko, Jr., the Rate Problem Manager-Vertical & Competitive Services of SNET, and sent to F. S. Koslowski and R. P. Little, the Rate Supervisor-Vertical & Competitive Services and Assistant Vice President-Revenue Requirements, respectively, of SNET.

248. The memorandum dated November 7, 1972 and marked Exhibit 248 (00486) was prepared by O. O. Ashworth, Jr., the Assistant Vice President-Revenue Requirements-Regulatory Matters of C&P.

249. The memorandum dated October 30, 1972 and marked Exhibit 249 (06722-06723) was found in the files of C&P.

250. Advice No. 800 dated November 13, 1972 and marked Exhibit 250 (22524-22525), together with revised tariff pages described in Advice No. 800, was transmitted by Mountain States to the Colorado Public Utilities Commission on November 13, 1972.

251. The document marked Exhibit 251 (22527-22544) is a copy of Decision No. 83232, dated June 22, 1973, of the Public Utilities Commission of the State of Colorado.

252. The letter dated December 31, 1974 marked Exhibit 252 (previously identified as part of Hall Ex. FF) was sent by AT&T's Director-Construction Plans, Director-Network Maintenance, Director-Management Analysis and Engineering Director-Switching to the Assistant Vice President-Network, the Assistant Vice President-Plant, the Assistant Vice President-Switching and the Engineering Staff Heads of each of the defendant operating companies.

253. The article, entitled "Indialing to PBX Extensions: Application in a Step-by-Step Central Office Area," by G. Norman Schleinkofer and marked Exhibit 253 (previously identified as Hall Ex. V), was published as AIEE Paper 59-185 in November, 1959.

254. The article entitled "CENTREX Service with No. 5 Crossbar," by George Spiro and marked Exhibit 254 (previously identified as Hall Ex. W) appeared in the October, 1962 issue of Bell Laboratories Record at pp. 327-331.

255. The article entitled "Centrex Service: A New Design for Customer Group Telephone Service in the Modern Business Community," by P. D. Shea and marked Exhibit 255 (previously identified as Hall Ex. Z), was published as AIEE Paper 61-722 in November, 1961.

256. The document marked Exhibit 256 (previously identified as part of Hall Ex. NN) is an excerpt from a Technical Reference Publication of AT&T, dated April 1971, at pp. 1377-1378.

257. The documents marked Exhibits 257A and 257B respectively (previously identified as parts of Hall Ex. DD and MM, respectively) are excerpts from the 1974 AT&T publication No. 1 ESS Today.

258. The article entitled "Identifying Centrex-CU Station Numbers Automatically for AMA Recording," by R. A. Fuller, marked Exhibit 258 (previously identified as part of Hall Ex. MM) appeared in the September, 1967 issue of Bell Laboratories Record, pp. 256-260.

259. Chart 070-241, marked Exhibit 259 (42441), is an excerpt from the Construction Program: Summary & Analysis, April 30, 1971 View (42419-42550) prepared by AT&T's Construction Plans Department.

260. The documents marked Exhibit 260 (previously identified as parts of Hall Ex. Y) are copies of Monthly Reports No. 7 filed by AT&T with the FCC between 1961 and 1971.

261. The charts titled 070-150, 090-260, 090-010 and 090-030 and marked Exhibit 261 (previously identified as parts of Hall Ex. Y and CC) are excerpts from the Construction Budget: Summary and Analysis, April, 1973 View, prepared by AT&T's Construction Plans Department.

262. The document marked Exhibit 262 (previously identified as part of Hall Ex. Y) is an excerpt from a study, entitled "Domestic Telecommunications Industry: Economic Behavior, Competition and Public Policy," dated May 10, 1974 and prepared by Systems Applications, Inc.

263. The document marked Exhibit 263 (previously identified as part of Hall Ex. CC) is an excerpt from the Plant Analysis Data prepared by AT&T's Operations Department in 1972.

264. The document marked Exhibit 264 (42813-42850) was prepared by employees of N.Y. Tel.

265. Letters in the form of the letter dated December 19, 1974 and marked Exhibit 265 were sent by the Internal Revenue Service to various taxable Centrex customers on or about December 19, 1974.

266. Letters in the form of the letter dated January 27, 1976 and marked Exhibit 266 were sent by the Internal Revenue Service to various taxable Centrex Customers on or about January 27, 1976.

267. The order marked as Exhibit 267 was adopted by the New York State Public Service Commission on August 24, 1976.

268. The order marked as Exhibit 268 was adopted by the New York State Public Service Commission on November 9, 1976.

269. Each of the documents marked as Exhibits and stipulated to have been prepared, sent, or received by an officer or employee of a defendant, unless otherwise stated in this stipulation:

A. Was prepared, sent, or received by the officer or employee of the defendant during the existence of his or her employment relationship with the defendant employer;

B. Except for the documents described in paragraphs 115, 119, 169, 204 and 205 above, was directed to or concerned with matters within the scope of employment of the officer or employee of the defendant who prepared or sent the document;

C. Except for the documents described in paragraphs 15, 16, 17, 24, 35, 109, 114, 134, 158, 249, 252, 253, 254, 255, 256, 257, 258, 262 and 264 above, was prepared, sent, or received on or about the date set forth in the document;

D. Except for the documents described in paragraphs 8, 9, 10, 11, 14, 15, 16, 17, 24, 35, 37, 38, 39, 40, 50, 54, 55, 56, 58, 59, 60, 62, 63, 64, 66, 67, 68, 69, 70, 71, 72, 87, 88, 89, 90, 109, 110, 111, 113, 117, 119, 120, 121 (page 39387 only), 122, 134, 135, 136, 138, 141, 142, 143, 144, 145, 152, 153, 154, 157, 169, 170, 171, 172, 173, 175, 178, 179, 182, 183, 184, 186, 188, 190, 194, 198, 204, 205, 208, 211, 219, 220, 223, 226, 248, 249, 253, 254, 255, 262 and 264 above, each document prepared by an officer or employee of a defendant was prepared on the basis of information known to the officer or employee who prepared the document or information transmitted to such officer or employee by a person with first hand knowledge of the matters referred to in the document;

E. Except for the documents described in paragraphs 15, 16, 17, 56, 58, 62, 63, 66, 68, 69, 70, 71, 72, 87, 88, 89, 90, 91, 92, 109, 110, 111, 113, 121, 134, 144, 145, 167, 168, 249, 253, 255, 262 and 264 above, each document prepared by an officer or employee of a defendant was prepared as a regular practice of the business activity of the defendant; and

F. Except for the documents described in paragraphs 15, 16, 17, 23, 35, 40, 50, 56, 58, 62, 63, 66, 72, 87, 88, 90, 109, 110, 111, 113, 134, 145, 249, 253, 255, 262 and 264 above, was kept in the course of the defendant's regularly conducted business activity.

270. Copies of the documents referred to and marked as Exhibits in this stipulation may be admitted in evidence to the same extent as originals.

271. Except for the documents described in paragraphs 93, 94 and 95 above, each of the documents referred to and marked as Exhibits in this stipulation is a complete and accurate representation of the actual writing which the document purports to represent.

Dated: New York, New York
February 28, 1977

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Nessen, Kamin & Soll

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So Ordered:

s/ Edward Weinfeld
U.S.D.J.

SUPPLEMENTAL STIPULATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

DUPONT GLORE FORGAN INCORPORATED, et al.,

Plaintiffs,

- against -

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants and Third-Party Plaintiffs,

- against -

UNITED STATES OF AMERICA,

Third-Party Defendant.

---------------------------------------x

73 Civ. 2447 (EW)

Supplemental Stipulation

The plaintiffs and the defendants, by their undersigned attorneys, stipulate for purposes of this case only:

1. The text of the letter and notes marked Exhibit 8A and 8B, respectively (09498-09508) is identical to the text of 09509-09519.

2. The text of the letter dated December 29, 1964 with attachment marked Exhibit 78 (12897-12898) is identical to the text of 08050-08051, 15754-15755 and 24775-24776, and the text of page 12897 of Exhibit 78 is identical to the text of 09825.

3. The text of the memorandum marked Exhibit 83 (06645) is identical to the text of 24777.

4. The text of the document marked Exhibit 109 (17100-17101) is identical to the text of 00084-00085 and of 00086-00087.

5. The text of the letter which is part of Exhibit 127 (06427-06428) is identical to the text of 04970-04971.

6. The text of the letter marked Exhibit 169 (01905-01906) is identical to the text of 01910-01911.

7. The text of the letter marked Exhibit 200 (00150-00168) is identical to the text of 06646-06664.

8. The text of the article marked Exhibit 205B (00199-00200) is identical to the text of 00194-00195.

9. Paragraph 57 of the Stipulation of Facts dated February 28, 1977 is amended to read:

> "Fifteen of the 19 defendant operating companies had no bank accounts in New York. Attachment I lists, for each of the four defendant operating companies which had bank accounts in New York, (1) the banks at which such accounts were maintained, (2) the period for which such accounts were maintained, and (3) the approximate average balance in such accounts."

Dated: New York, New York
April 12, 1977

Nickerson, Kramer, Lowenstein,
Nessen, Kamin & Soll

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So Ordered: April 18, 1977
s/ Edward Weinfeld
U.S.D.J.

TRANSCRIPT OF TRIAL, MAY 5, 6, 9, 10, 11 and 12, 1977

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------X

DUPONT GLORE FORGAN INCORPORATED, et al., :
:
Plaintiffs, :
:
- against - :
: 73 Civ 2447
AMERICAN TELEPHONE & TELEGRAPH COMPANY, et al., :
:
Defendants. :

-----------------------------------X

New York, N. Y.
May 5, 1977 - 10 a.m.

Before:

HON. EDWARD WEINFELD,
District Judge

Appearances:

NICKERSON, KRAMER, LOWENSTEIN, NESSEN, KAMIN & SOLL, Esqs.
Attorneys for Plaintiffs
BY: EUGENE NICKERSON, Esq.
ROBERT HELLER, Esq.
MICHAEL OBERMAN, Esq.

DAVIS, POLK & WARDWELL, Esqs.
Attorneys for Defendants
BY: GUY MILLER STRUVE, Esq.
HIRAM D. GORDON, Esq.
L. GORDON HARRISS, Esq.
RICHARD J. CUNNINGHAM, Esq.

CLARENCE M. DUNNAVILLE, JR., Esq.
VICTOR S. GOMPERTS, Esq.
BURTON K. KATKIN, Esq.

THE CLERK: For trial, Dupont Glore Forgan Incorporated v. American Telephone & Telegraph Company.

Plaintiffs ready?

MR. NICKERSON: Plaintiffs ready.

THE CLERK: Defendants ready?

MR. STRUVE: Defendants ready.

THE COURT: Proceed.

MR. NICKERSON: Your Honor, for the record, my name is Eugene Nickerson, of the firm of Nickerson, Kramer, Lowenstein. We represent plaintiffs. On my left is my partner, Robert Heller, and on his left my associate, Michael Oberman, and also assisting us from our paralegal staff will be Mr. Jonathan Brecht, on Mr. Oberman's left.

May I make a very short opening statement, your Honor, to tell you where I am going?

THE COURT: All right. Not more than a half hour.

MR. NICKERSON: No. Much less, your Honor.

Your Honor, plaintiffs make two kinds of claims here. The first is an antitrust claim, in which we allege that all of the defendants conspired among themselves to maintain the Centrex package rate structure, which your Honor is familiar with from the motions; that they did this in order to preserve and increase their profits--all this in violation of Section 1 of the Sherman Act.

Our other class of claim is that the defendants violated an obligation which we say they had, to provide a separate charge for the Centrex service, so that the plaintiffs would be entitled to the exemption which the Excise Tax Reduction Act of 1965 provided for private communication. Had they separated it, the intercommunication component of Centrex service would have been exempt from tax.

THE COURT: If you don't mind my interrupting--

MR. NICKERSON: Not at all.

THE COURT: -- what do you base the second claim on? Do you base this upon the statute itself or upon common law? Your adversary seems to suggest that you are confining yourself to the statute itself, that the statute imposed a duty on the defendant, and at another point the defendant suggests that you do assert a right derived from common law.

MR. NICKERSON: No, your Honor. We say that it stems from the statute and that implied into the statute should be a requirement that the defendants act reasonably. You make that implication --

THE COURT: You say that implied duty would require them to separate the charges on their books without reference to any state regulatory agency?

MR. NICKERSON: Yes, your Honor.

THE COURT: And that they had to do this within a reasonable time?

MR. NICKERSON: Yes, your Honor. We say that even if it is construed, your Honor, in such a way as to require a tariff change -- even if it were construed that way -- we still say that they would have had the duty to do that.

THE COURT: You don't acknowledge that a tariff change was required, that they were required to file a new tariff in order to effect a separation of the charges.

MR. NICKERSON: We do not, your Honor, and we think the legislative history of the Act shows that Congress intended that there need not be a tariff change in order to separate the charges.

THE COURT: Will you define for me what the nature of this duty was that you suggested derived from the statute? Do you refer to it as a fiduciary duty or what?

MR. NICKERSON: Yes, we have referred to it as a fiduciary duty, your Honor. What we say is that in order to interpret the statute so that it would meet the test of the Constitution, point 1, that you should imply a duty into the statute; otherwise we say that it would be an unconstitutional delegation of the taxing power to the telephone companies.

Because it is not like the cases, your Honor, we submit, where two parties structure a transaction so as to take it out of a tax statute. Rather, it is one, if you accept the argument that they had the discretion to make the determination as to whether they would separate or not, then they had the discretion to impose a tax on the plaintiffs, and it would have no other legal consequences.

THE COURT: Mr. Nickerson, you in effect structure your position with respect to this duty on the part of the defendants on a constitutional basis, that unless it is interpreted in the manner you suggested, there is a delegation of the taxing power to the defendant.

MR. NICKERSON: That is one of the arguments.

THE COURT: Isn't it necessary for you to do that?

MR. NICKERSON: No. No, it is not, your Honor. There are other arguments that we have as to why you should imply it, which are set forth in our brief. One is that in effect they lobbied and drew the basic provisions of the statute, and therefore it should be construed just like an insurance policy, most strictly against them; further, that they --

THE COURT: Isn't that an unusual position you take, that the position of people who are urging their views upon Congress and whether you use the expression "lobbying" or otherwise, should be taken into account? You have different groups advocating different positions with respect to legislation. Isn't this a kind of far-fetched theory that you advocate here?

MR. NICKERSON: I think not, your Honor, because that theory has been adopted, for example, in private bills, and this is very close to a private bill, because the only people that were affected by this were the Bell Company, plus the independent telephone companies.

THE COURT: How about the taxpayers? Weren't the taxpayers affected by it?

MR. NICKERSON: If they were given the discretion, yes. Yes, they were.

THE COURT: Well, I just want to make sure that I understand your position with respect to your latter point.

MR. NICKERSON: Your Honor, if I might just add a word, Mr. Heller reminds me to, and that is that this is not an unusual thing to do. I refer your Honor particularly to Steele v. Louisville and Nashville Railway, which is discussed at some length in our brief. That was a case --

THE COURT: Yes, but that was not postulated on a constitutional basis, was it?

MR. NICKERSON: Indeed it was, your Honor. When we say we don't postulate it on the Constitution, we say the Constitution is in the background, just as it was in the Steele case. Just as in the Steele case, to have construed the statute to have given the union absolute power, without standard, to do what it wanted to the members of the class, not of the union, the members of the class, would have brought on constitutional problems.

THE COURT: What were the constitutional problems?

MR. NICKERSON: That was a due process issue, your Honor. The allegation there was that they had discriminated against blacks, that is, the union had, in making the agreement with the employer, and the issue was whether the statute allowed them to do that. If it did, grave constitutional problems would have arisen. Indeed, Justice Murphy, in dissent in that case, your Honor, said that it was unconstitutional as applied to statute, and what Chief Justice Stone said at that time, in the majority opinio was that they did not reach that question, because implied into the statute -- and there was not a word in the statute which implied that duty, not a word -- but the court went and implied it and required the union to act reasonably, so that it would conform to the constitutional standard.

So that we don't base it on the Constitution as such, your Honor; we just say, as in many cases, where one construction of the statute would bring on grave constitutional problems and another where you imply a reasonable standard imposed on the defendant would not, that the Court should adopt that construction which avoids the constitutional problem.

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THE COURT: All right, proceed.

MR. NICKERSON: Your Honor, basically what we intend to do in our proof is to follow the order of our pretrial memorandum. We will identify the parties and in particular the relationship of the defendants, the AT&T and the defendant operating companies in the Bell System.

We will show that AT&T had the controlling stock of twenty-one of the twenty-three companies but only a minority of two of them: 26 percent of the Cincinnatti Bell and 18 percent of Southern New England.

Then we will move, your Honor, to show you something of PBX service, that is private branch exchange service.

THE COURT: That is the situation where there was a separation of services?

MR. NICKERSON: Yes, your Honor.

In PBX service, private branch exchange services, they basically provide two capabilities. One was internal communication. You could dial everyone within the customer's premises, and you could dial out to the exchange network. And separate charges were made for the telephone stations, for the switching equipment, which was on the customer's premises and known as step-by-step switching equipment, and a separate charge for the trunks, which gave access to the

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telephone network.

Now, in thirteen of the twenty-one companies, PBX service also had another capability, and that was direct in dialing, which your Honor is familiar with, where an incoming call could be dialed directly to a specific station of the customers. Six of those thirteen companies also rendered PBX services with another capability, and that was identified as outward dialing.

So that an outward dial toll call could be identified for the customers' administrative purposes as coming from that particular station.

THE COURT: I have never been quite clear on that. I meant to ask:

Just how did that work, that outward call?

MR. NICKERSON: It worked in two ways, your Honor:

It worked two different ways, and it is important for this case, the two different ways and it depended on the kind of switching equipment that was used, and I will get into that in detail.

One was, you simply dialed your number, and automatically it was recorded in the machinery of the telephone company and then went on --

THE COURT: What was recorded? That's what I am trying to find out. You both addressed yourselves to that, and maybe it is my shortcomings and I am frank to say I meant to ask you about that, because it isn't clear to me. What was recorded?

MR. NICKERSON: What was recorded was the station that was making the call. If I dialed Chicago, my particular station, that call could be charged to that particular station and not just to the customer generally and that was automatically done in the case of Centrex CO, which we will get to.

In the case of Centrex CU, however, I would have to give my number to the telephone operator. She would put it into equipment which would record it, and then the company for whom I worked would have a record that I had dialed Chicago.

THE COURT: In other words, the difference in the one instance is that it was an automatic recording of who made the call and who was to be charged, and in the other instance an operator made it. Is that the difference?

MR. NICKERSON: That is one of the differences between Centrex CU and Centrex CO.

A person having CU would have to give his number to the operator.

THE COURT: And CO was automatic?

MR. NICKERSON: CO was automatic.

THE COURT: What other differences were there?

MR. NICKERSON: There are several differences between Centrex CO and CU.

You will recall, your Honor, that in Centrex CU the switching equipment was on the customer's premises, and in Centrex CO it was on the telephone company premises, and Centrex CU was the same type of PBX step-by-step dial equipment, which was on the premises of the customer.

And then there were trunks that went from the customer's premises to the telephone central office.

In the case of CO there was no equipment, no dialing equipment, on the premises of the customer. Each telephone, each station, my station, every one of my associate's stations, would have a pair of wires that went all the way from the customer's premises all the way to the telephone company premises, and what it meant, by and large, was that Centrex CO was much more expensive to render than was Centrex CU. And yet, when they came to offer Centrex, AT&T told the operating companies, "Make basically a composite rate."

THE COURT: Well, you make a point of that. There were uniform rates charged with respect to the two systems.

MR. NICKERSON: Yes, and furthermore, your Honor --

THE COURT: What is your specific complaint about that? That is more under your antitrust claim.

MR. NICKERSON: Yes, your Honor, it is. But it also bears on the motivation, we say.

Your Honor, we say this:

Centrex CU was not as good a service as Centrex CO. In the first place, you didn't get the automatic recording of the outward dialing feature. In the second place, it was big and noisy and it was on your premises. It was more difficult to maintain, in the sense that people had to come from the telephone company office and maintain it on your premises, so that the lag in maintaining it was greater, and, just all-around, CO was a better service.

Now, not only was CO a better service, the CU customer subsidized the CO customer, because the cost of rendering CU was less than that of rendering CO, so we got a worse service, and, what's more, he subsidized the CO customer, and it is recognized in one of the documents that as a result of these different rates between CO and CU, that this made the Centrex structure "vulnerable" to regulatory criticism.

And this, we say, in part explains the motivation that AT&T had in not separating the charges, because we say that they felt that if they did, they didn't know what would happen to the Centrex rate structure. There is testimony that they were even concerned that the regulatory agency might broaden it and attack the overall rate of return of the company.

So that basically what this goes to, your Honor, is what we say is a proper inference as to what might have been the proper motive of AT&T in not separating them.

THE COURT: Well, that argument, though, must necessarily accept the defendants' position that in order to effect a separation of charges they had to file tariffs with the different regulatory agencies. And your basic position is that the separation of charges could have been effected upon their own books without filing a new tariff.

MR. NICKERSON: I don't think it bears on that issue, your Honor, because that depends upon what the statute means, what the Federal Excise Tax Reduction Act of 1965 means. When they say separate charge, does that mean an average in the tariffs?

We say not. And one of the reasons we say not is that in the AT&T draft that they presented to the staff of Congress they included language which defined local telephone service to be a charge in a tariff.

THE COURT: Well --

MR. NICKERSON: And the staff of the Congress deliberately took that out, your Honor, and Mr. Woodworth, now an assistant Secretary of the Treasury, who was the chief of the staff, said that he did not want the tax dependent upon state action, and we think that it is clear that that language came out, your Honor, because of a determination that they did not want it subject to that.

THE COURT: Are you suggesting that the intent of a federal statute may be determined in part by what the proponents of a bill advocated?

MR. NICKERSON: Indeed we do, your Honor.

THE COURT: Do you have any authority to support that?

You know there is even a question as to whether or not a statement by a member of the House or the Senate on the floor of the Congress can be considered on the question of purpose of legislation. You are going beyond anything that I was.

Assuming that you are right, you are saying that these proposals can be attributed solely to AT&T, that statements and declarations of AT&T representatives can be considered on the question of intent.

MR. NICKERSON: I do say that, your Honor.

THE COURT: I thought you did.

MR. NICKERSON: I do say that, but more importantl your Honor, I think that the statements of chiefs of staff in a technical matter like this, on which the Congressmen relied, are more important, and these very materials, your Honor, were used by AT&T when they argued before the Treasury as to the meaning of the statute, and when they got a ruling with respect to whether a charge needed to be included on the bill or whether it could just be on the books of the company. So that we think that that is proper and that this is certainly the statement of the chief of staff, on whom Congressmen rely.

THE COURT: Chief of staff of whom?

MR. NICKERSON: Chief of staff of the Joint Committee on Revenue Taxation, Dr. Woodward, on whom the Congressmen relied in technical matters of this kind.

THE COURT: Well, if one accepts your position, what does that lead you to?

MR. NICKERSON: Well, what it leads me to, your Honor, is that a change in the statute did not necessarily mean that it had to be done by a tariff change, that it could have been done by simply amending the books of the operating companies.

THE COURT: Well, I am asking you again:

What does that do to your argument that one of the reasons they have uniform rates for the two Telex items was for the purpose, really, of avoiding -- you say this was part of the conspiracy. Actually, it was an inquiry as to whether or not they were imposing unreasonable rates.

MR. NICKERSON: Yes, because they took the position that it could only be done by a tariff change. We say they were wrong about that, and we don't know --

THE COURT: I understood you to say that originally they insisted on the word "charge".

MR. NICKERSON: No, they insisted on the word "tariff".

THE COURT: Oh, they insisted on the word "tariff"?

MR. NICKERSON: Yes, AT&T insisted on the word "tariff" and that came out of the Act, they said it could only be done by a tariff charge.

Now, whatever their motive was, whether they believed it was bona fide or not, I have no direct evidence on that issue. I suspect, for what it is worth, that it is very useful.

THE COURT: Why does it follow if one system had some shortcomings and wasn't as good as the other, that if they had filed tariffs which were to both that they weren't useful, that necessarily there would be an investigation and, what you are suggesting, a cutback of the rates?

MR. NICKERSON: That was in their minds, your Honor.

THE COURT: How do you prove it was in their minds?

MR. NICKERSON: Because I have testimony from them, which I will read to you in their depositions.

THE COURT: All right. Go ahead.

MR. NICKERSON: I think now your Honor has brought out most of what I was going to say about Centrex CO and CU. There is one other thing that AT&T set forth in their instru tions when they decided to institute direct in dialing beyond th thirteen companies that had it, and that is that they emphasized it was important for the operating companies to keep in their own hands the decision of whether the mode of services that would be rendered was CO or CU, and they also emphasized that this was an opportunity for the operating companies to obtain increased earnings on the old PBX equipment.

Of course, they wouldn't go back to the regulatory agencies for an increase in rates, even though the equipment that they were using for Centrex CU was the same equipment that they had been using for PBX.

Throughout AT&T's instructional material, which came in the spring of 1961, they emphasized how important it was to have uniformity of rate structure among all of the operating companies, and they explained why it was important: Because they had national customers that had installations in several operating companies, and they didn't want to have complaints from those national companies that there was a different rate structure, and, further, they thought that having a uniform rate structure would tend to keep the rates -- which naturally would differ to some degree, becaus there were differing costs in the same areas -- but would tend to keep the rates closer to each other.

So that after receiving the instructional materia the operating companies filed tariffs for the Centrex rate, some of them not until several years later, and all of them, without exception, filed the package rate.

Then, your Honor, we are going to go into the lobbying effort of AT&T, of which I have told you the substance already in answer to your question.

Even before the Act was passed AT&T made a judgment on the basis of the draft that they proposed to the Congress that they were not going to separate the rates, and we have testimony that we will read in that what concern them was that customers or regulatory agencies would broaden the proceedings if they filed tariffs and affect the company' rates in some fashion.

They held conferences, we will show your Honor, in 1965, in which they emphasized again to the company that it was important to have uniformity throughout every one of the companies, and, indeed, every one of the companies complied with that. None of them, not a one, separated the rates.

When customers complained, we will show, over the years, after the Act was passed, up until 1971, the complaints were referred on to AT&T, and AT&T said that it adhered to its position that the rates should not be separated.

Now, your Honor, in the interim --

THE COURT: You say the rates should not be separated. You are talking between the Centrex CO and CU?

MR. NICKERSON: No, your Honor.

THE COURT: What are you talking about, then?

MR. NICKERSON: I should have made that clear. I am talking about the intercommunication, the capacity to intercommunicate, that is, private communication.

THE COURT: You are talking about the statutory provisions for the separate charges?

MR. NICKERSON: Now, your Honor, in the interim, and about the end of 1968, the Federal Communications Commission decided a case called Carterfone and basically what that case did was to invalidate the Bell System tariffs which had been filed and which prohibited the interconnectio of devices other than the Telephone Company devices with the telephone network.

They said that those tariffs were unreasonable and discriminatory, and as a result, of course, private manufacturers of equipment now could have head to head competition with Centrex service. Prior thereto, prior to the Carterfone decision, a manufacturer of internal communication equipment could not have his equipment connected with the exchange network, so that if a customer wanted to get from anyone else than from Bell intercommunication, private communication, why, he would have to have two phones on his desk, one to intercommunicate and one to get out to the exchange network.

After Carterfone, with the requirement that ther be interconnection, now this equipment would be capable of receiving in dialing and identified outward dialing, so now AT&T said, "Now we are faced with head-to-head competition with these outside manufacturers. We better separate."

So that's what they did. They sent out a letter--

THE COURT: Carterfone came down in 1968, you said?

MR. NICKERSON: It did, your Honor.

THE COURT: But actual separation didn't begin until 1971?

MR. NICKERSON: Yes, and it took some time for those companies -- indeed, they weren't in full competition by 1971, but they anticipated it -- it took some time for the to gear up to make those capabilities available.

THE COURT: Well, I take it your view -- at least your argument is that -- the only reason for the separation beginning in 1971 was because they were now faced with the threat of competition?

MR. NICKERSON: Yes, and it is admitted that that was one of the main reasons.

THE COURT: They admit that?

MR. NICKERSON: They admit that that was one of the main reasons, yes.

THE COURT: All right.

MR. NICKERSON: Finally, your Honor, we are going to put some evidence in to show that the contention they have that the refusal to separate until 1971 wasn't motivated by an expectation that the tax would expire at some early date. That, we say, was simply a concoction that was made to spoon out to customers.

After the event, we think it is belied by the documents.

And finally, your Honor, we say that although the defendants turned over the money to the government, someone has to sustain the loss, either the plaintiffs or the defendants, and we say that it should be the defendants, who refused to separate to advance their own interests, and it should not fall to the plaintiffs.

THE COURT: Mr. Struve, I will give you a half-hour, too.

MR. STRUVE: I will try not to take it all. I will be brief in my statement.

THE COURT: Before you begin, Mr. Struve, I have one question to ask you:

Can you succinctly state what was the basic reason that the Telephone Company did not separate the charges after the passage of the statute?

MR. STRUVE: There is no way that I can state one basic reason, because there was no basic decision.

THE COURT: Well, state as many as you can.

MR. STRUVE: I think it would be best to start with the people in the AT&T rate group who considered whether they should recommend to the assistant vice president in charge of rates at AT&T, who was the one who had the authority to make such a decision, whether AT&T should recommend to the operating companies that they file revised tariffs establishing separate charges.

The decision they reached, after talking among themselves, was that they should not make such a recommendation to the assistant vice president at that time.

THE COURT: Well, would the plaintiffs -- they now assert their right to the benefit of a tax exemption if there were to be a separation -- be dependent upon the judgment of somebody in the Telephone Company's office and making a recommendation to a rate-making officer? Is that what you ar[illegible]g?

MR. STRUVE: What I am trying to explain to your Honor in answer to your question, what were the reasons --

THE COURT: Well, that was the first one. That is why I am asking the question.

MR. STRUVE: We have to focus on the reasons of the people who considered the question, and I am trying to explain that the people who considered the question in AT&T were staff members subordinate to and reporting to the assistant vice president who had the authority to recommend a separation to the operating companies, and until 1971 they at no time made a recommendation to the assistant vice president that such a recommendation be made to the operating companies.

THE COURT: Well, Mr. Struve, I hope you don't mind my interruptions, and if necessary, I will issue a caveat to counsel in the case that because I ask questions it doesn't mean that I have an opinion on the case. I have read the extensive briefs.

Taking the last point, let us suppose that the lower echelon people -- let's use that term -- in 1971 had not made that recommendation to the rate-making officials in your company, how long could they continue to do this: refuse to make a recommendation?

MR. STRUVE: I'm not sure I understand your question.

They made a recommendation --

THE COURT: Let me get your last answer.

(Record read.)

THE COURT: That is exactly what I put to you.

Suppose they had not decided to do so in 1971. How long could they continue the position, and would the plaintiff have no right to benefit from the separation of taxes?

MR. STRUVE: At any time in 1966 as well as in 1971, any plaintiff that wished to do so could complain, either formally or informally to the state regulatory authorities that have jurisdiction over the Centrex rates or to their staffs, and such a complaint would be definitely acted upon.

THE COURT: Well, in the instances when the complaints were made, what action was taken? There were a few instances where complaints were made, including one by a plaintiff in this case.

MR. STRUVE: There were a few instances where complaints were made to one or another of the operating companies, and they decided, after considering the matter as it appeared to them at that time, that it wasn't an appropriate thing to do at that time.

What I am saying is that none of those customers and no other customer took the logical next step, if they really wished to press the question, of going to the state regulatory authorities which at all times had jurisdiction to direct the filing of revised tariffs for any reason including federal excise tax reasons.

THE COURT: Well, again I want to make sure that I understand your position on that.

Is it your position that the subscribers, or the people who were buying the service, in order to gain the benefit of the tax exemption in the absence of a separation by the defendants, were under a duty to make a demand for the relief or to urge the state regulatory body to require you to file a new tariff?

MR. STRUVE: That's correct, your Honor, and if

I may explain why that is our position, it follows from the fundamental nature of the public utility regulation to which telephone companies are subject in every state. Before the public utility commissions were created by the legislation which began in the 1910's, and has continued now until every state has such a commission and did during the relevant period, common carriers such as telephone companies had common law duties not to charge unreasonable rates and not t charge unjustly discriminatory rates, which were enforceable if necessary by suits before juries at common law.

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When the public service commission statutes were passed, one of their main purposes was to substitute for that common law scheme of remedies a statutory scheme under which questions of justness, reasonableness, and unjust discrimination would be decided by the public Service Commissions, which were established by those statutes. And in order to make that mandate effective, the laws contain -- and it is uniform in all of them; we set them forth in Appendix B to our main brief -- a provision that says in precisely these words that all rates, charges, or rentals for any telephone service charged by any telephone company must be set forth in tariffs which are validly on file with the commission.

And then they go on to provide that no such tariff may be changed except with the permission of the Commission, and that the commission at any time, if it finds, after hearing, that the tariff is unreasonable or unjustly discriminatory, may order that it be changed.

So that the statutory scheme which Congress found operating in this area when it enacted the communications excise tax laws provided that the judgment as to what charges a telephone company should be permitted to make was reserved to state regulatory authorities. And the cases which we cited in our brief, as well as the legislative history of the communication tax laws, make it clear that Congress did not intend to displace that authority but merely intended to impose a federal excise tax upon the charges so defined.

THE COURT: Well, I am going to ask you a question about that. You started to answer the first question that I put to you, and I want you to finish your answer to that. I don't want you to have a broken thought. I put a simple question to you and asked you to state succinctly the reason why the telephone company did not put into effect the separation of charges until 1971.

You gave one reason now, and that was, as I made a reference, perhaps using a euphemistic expression, that the lower echelon did not get to the point of recommendation for a period of time.

Supposing you go on and give me the other reasons.

MR. STRUVE: I made that reference, your Honor, not in order to make that a reason, but simply in order to explain that the reason why I could not simply give a list of reasons in answer to your question is that there was no time when the companies involved here sat down together and said, "We are now going to address the question of whether we have separate rates or not," and then addressed it and came to a binding agreement.

Instead, there was, on AT&T's part, consideration of the question by staff people, who will testify here, which led them not to make a recommendation to their Assistant Vice President until 1971.

There was also consideration of the question by staff people in some of the defendant operating companies. In other defendant operating companies there was no consideration of this question until AT&T's recommendation was sent to them in September of 1971.

So that there is no single, all-encompassing answer that can honestly be given to the question, "What was the reason why the telephone companies did not do this?"

I can, however, summarize the testimony that your Honor will hear as to why the AT&T staff people did not until 1971 think the time was appropriate to make such a recommendation.

The first reason is that any tariff change, this change included, this change more than most, involves a substantial amount both of rate-making judgment in formulating what tariff changes should be made and of expense and administrative difficulty in following out the change. Because once the tariffs are changed, service order procedures must be changed, computer methods must be changed, commercial practices must be changed.

All of these sound in the abstract as though they are small items. In the companies we are talking about, we multiply each of them by 10,000 or 20,000 people in order to get the number of people who must be retrained to effectuate new procedures.

So the first reason that occurred to the AT&T staff people, as they discussed this question among themselves, was that here was an administratively burdensome process of tariff change which is going to take probably at least two years to complete. And it did in fact take about two years to complete.

The second thing that motivated the AT&T staff people who discussed the question was that in the Excise Tax Reduction Act of 1965, and subsequent thereto at all times until the end of 1970, what Congress had enacted was a statutory schedule not just for the reduction but for the complete repeal of the excise tax within a relatively few years.

It was extended on three or four occasions during the period, but each time it was extended Congress emphasized that it was an emergency measure and that they did not want anyone to think that they were getting off the track of repealing this tax in the end.

The people, therefore, who considered this question were concerned that they might make a recommendation to the operating companies that they go through the administrative expense, problems, filings with the Commissions, to make the tariff change, only to find that just after the tariff change got made, or perhaps even before it, the tax had been completely repealed.

THE COURT: I said I would not interrupt, but of course your adversary's response to that is that no responsible telephone company official really believed that the tax was going to be reduced in the light of economic conditions then prevailing, and they have referred in their brief to some documentary evidence to support that.

MR. STRUVE: We take sharp issue with that, your Honor. Your Honor will hear the staff people in question testify. In our view the sincerity of their belief that the tax was going to be repealed is unimpeachable, and it certainly is not impeached by

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evidence as to what some other telephone official thought at some different point which was not communicated to them.

THE COURT: Even assuming that there was a likelihood of a reduction and ultimate elimination of the tax, how would the elimination of the tax be effected?

You said that one of the reasons you held back was because of this prospect of elimination of the tax. What was the reason for holding back? What impact does one have on the other? -- is what I am asking you.

MR. STRUVE: The answer is that the expectation that the tax would be eliminated within a short time was a reason for not undertaking the administrative burden and expense, particularly when the separation carried other possible disadvantages in their view, which I was about to explain.

THE COURT: Go ahead.

MR. STRUVE: Another thing that concerned them was that if such a separation was made, the Internal Revenue Service would question the method in which the separation was made -- I am referring now to the separation between exchange access and intercommunication, because now only one of those would be taxable.

THE COURT: When you make that reference to that difference -- and, as I said, I just want to make sure I understand what you fellows are arguing about -- is that the difference between Centrex-CO and Centrex-CU?

MR. STRUVE: No, your Honor, it is not. Centrex-CO and Centrex-CU are two different forms of Centrex service. The difference between them is that in the case of Centrex-CU the switching equipment which intercommunicates among the subscriber's stations is on the subscriber's premises, and CU stands for customer.

Centrex-CO, on the other hand, has the switching equipment in the telephone company central office, and CO stands for central office.

The Centrex station charge for both Centrex-CU and Centrex-CO was substantially the same during the period we are talking about. The only difference was that there was a slightly higher charge for Centrex-CO in most instances to reflect the fact that in the case of Centrex-CO the telephone company provided the heat, light, space, power, for the switching equipment because it was on the telephone company premises.

When I speak about a separation of charges, I am referring not to the difference between these two forms of Centrex, but rather to the question of separating the charge per month for each Centrex station into two components, one of which would be for exchange access, which would remain taxable, the other of which would be for intercommunication.

What I am saying is that the third reason that was on the mind of the AT&T staff people who thought about this question was that there was a possibility -- and as things have worked out it has become a reality -- that the Internal Revenue Service would not only challenge the method of allocation that was used but would broaden its inquiry to other questions related to the taxability of Centrex equipment that would survive a separation of a Centrex station charge.

THE COURT: Suppose they questioned that, to whose disadvantage would it be? Would it have any impact at all on the plaintiffs who claim they might have received the benefit of tax exemption? What was the disadvantage of IRS making this inquiry?

What areas would it open up?

MR. STRUVE: It is difficult to predict. The first and obvious thing for the IRS to do would have been to back-bill customers for as much as the statute of limitations would allow for what they thought

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was a tax advantage that the telephone company had improperly allowed them.

It is conceivable that under --

THE COURT: Well, the company was not allowing any tax exemption except in the case of PBX. It was not allowing it in Centrex at all, as I understand it. How could the IRS be concerned with the tax that had been paid? What additional tax would there be? Now, make yourself clear on it. I want to understand this.

MR. STRUVE: The answer to that, your Honor, is twofold. One is that whether or not in retrospect we think that they should have been concerned about this point alone, the AT&T people who considered this question were concerned about the IRS challenging the allocation, even though in retrospect we might feel that the main brunt of that would have fallen upon the customer.

THE COURT: That is what you said. What would they be questioning? -- is what I don't understand. What would IRS be questioning in this case? The plaintiffs say they paid the tax. How could the IRS open a can of worms and say, "Well, you owe an additional tax here?"

MR. STRUVE: I am sorry, your Honor. What they would question and what they are now questioning --

THE COURT: Your associate wants to give you a paper. Maybe they have a better answer than you have given so far.

MR. STRUVE: He wanted to remind me of a second point, which I was about to get to.

THE COURT: Oh, you are ahead of him.

MR. STRUVE: I wanted, though, to make clear that the challenge we are talking about is a challenge after the separation of charges to the manner in which the charges were separated, and IRS's point would be that not enough was put in the taxable exchange access portion, too much was put into the non-taxable intercommunication portion.

THE COURT: That would only happen once you set up the separation of charges.

MR. STRUVE: That is correct.

THE COURT: I must say, now, you must forgive me asking these questions, because I do want to understand the position of each side here.

The plaintiffs complain that they paid taxes on the private communication part of their service, and they paid the taxes because you failed to set up a separation of charges with respect to that portion, which you were permitted to do under the statute.

Having paid the taxes because you failed to separate them, what can be opened up with respect to those taxes?

I understand your last point that in the future, that if he did separate charges, the IRS would come along and say, "Well, you excluded too much or you included too much." I would understand that.

MR. STRUVE: Your Honor, before I get to the second point, which my associate reminded me of, I think it is important to distinguish clearly here between two things. One is, what were the reasons which the AT&T staff people had? What were the somewhat different reasons which those individuals in the operating companies that considered the question had?

We are not here sitting in retrospective judgment on those reasons, except to the extent that they are relevant to the legal claims that plaintiffs' express here. And on the Excise Tax Reduction Act of 1965 claim, it is our position that the reasons are not relevant because under that Act the question as to whether separate charges should be instituted was left to the state regulatory authority. And if our judgment was in any way unreasonable, it should have been questioned in those state regulatory authorities prospectively, at a time when this question was open for determination by those commissions.

THE COURT: That comes back to your first argument.

MR. STRUVE: Excuse me?

THE COURT: That comes back to your first argument, really, that in any event you had to file a tariff.

MR. STRUVE: That is right.

THE COURT: I want to ask you a question about that. The tax itself is not part of the charge made by the telephone companies. You file a tariff and you are permitted to charge according to the services you render and the equipment you supply. The tax plays no part in that at all, does it?

MR. STRUVE: But the tax is imposed by its very terms --

THE COURT: Pardon?

MR. STRUVE: The tax is imposed upon payments made for telephone services, and in the case of Section 4252(d) the statute requires -- and this is the requirement we are talking about here -- that for a tax exempt private communication service there be a, quote, "separate charge," unquote.

And our position -- and I should say that it is the position that was taken by the Bell System's legal people throughout the period we are talking about, and I don't think there can be any fair question as to their good faith in taking that position -- our position is that if you look at the state laws which require that all of our charges be set forth in tariffs filed with regulatory authorities, and if you look at the federal case law which expressly said that the federal excise tax is imposed upon the charges set by state regulatory authorities, then it will be clear that when the statute uses the term "separate charge," as a matter of law it means a separate tariff charge.

I remind your Honor again that a telephone company --

THE COURT: I follow that, but maybe you are not following me. Just assume that I know very little about this. I assume that your tariff, as in the instance of any utility, is filed and reflects a charge that the utility asserts as a fair and reasonable charge, or a non-discriminatory charge, whatever the statutory language is -- I am not trying to follow it now. And this is a charge that is based on services rendered or equipment supplied.

Let us say the unit charge is a dollar for the services, and the government comes along and says that with respect to your tariff schedule, a 2 per cent tax should be levied, the federal government being the recipient of the 2 per cent tax. How does this tax affect the tariff? What does the tax have to do with the rate to be charged to the consumer?

If I go into a store and I buy a suit today and the City of New York charges 8 per cent sales tax, I am still paying, let's say it is $100 per suit, which is pretty cheap today, what has the tax got to do with it?

MR. STRUVE: The answer to your question is that the tax --

THE COURT: And why did you have to file a new tariff? That is really what it comes down to here. Why was it necessary to go to the state regulatory body in order to put into effect this separation of charges? That is what, really, I am asking.

Let me put it a little differently.

MR. STRUVE: In very simple terms, your Honor --

THE COURT: I had this question in mind.

MR. STRUVE: The answer is --

THE COURT: Let me finish. I had this in mind when I finished reading the plaintiffs' brief, and I was halfway through yours when you cited a case which I think expresses exactly what I have been trying to get from you, and it is the case that you cite of Carrigan v. Sunland, at page 56 of your brief.

"The Commission rates had nothing to do with the federal tax, and the federal tax had nothing to do with fixing the rates, but was on them as fixed."

I am asking, why did you have to file a tariff [illegible] the state regulatory bodies with respect to the regulation of charges?

MR. STRUVE: The answer to that, your Honor, I can't do better than read Section 92(1) of the Public Service Law, it is typical of all the laws in all the states:

"Every telephone corporation shall print and file with the Commission schedules showing all rates, rentals, and charges for service of each and every kind by or over its line between points in this state."

And then it goes on for another page with clause after clause to make absolutely clear the all-inclusive nature of this requirement.

THE COURT: You say that encompasses a

requirement that whenever tax is imposed, to file a tariff with respect to that tax?

MR. STRUVE: No, but it does encompass -- because taxes, as your Honor rightly said, are not in the tariff. What it does say, though, is that any time that a telephone company wants to establish a separate charge for a service that does not presently have a separate charge, or any time that a customer wants a telephone company to do so, that cannot be done by a bookkeeping allocation. You cannot write something in your books and say this is a separate charge. It must be done inthe tariffs filed with the state regulatory authority, because that is the part of the statutory scheme which was established by the states and which the Carrigan case makes it clear Congress intended it to respect. Remember again, the Carrigan case --

THE COURT: In other words, you are saying the tariff was filed with a different agency, it was all-inclusive, included the private communications system as well, and that if there were to be a separate charge, then you were required to show this on your schedule as a separate charge.

MR. STRUVE: That is correct.

THE COURT: Is that what you are saying?

MR. STRUVE: That is correct. And I go further than that, and I say that because Congress expressly recognized and intended -- the Carrigan case shows this, the legislative history of the 1965 Act shows this -- that the Federal Excise Tax would be levied upon the charges as they were found in the tariffs filed with the state regulatory authority.

As a matter of law the question whether or not there shall be such a charge reposes in the state regulatory authority, not in the plaintiffs and not in us.

THE COURT: Yes, but I am coming back again. I am saying that the tax is not a charge.

MR. STRUVE: You see, Congress might have had the power to impose the tax on something other than the tariff charge as filed with and approved by the state regulatory authority. Our point is, they did not do that. They imposed the tax upon the tariff charges, and that is made clear by the legislative history, by the Carrigan case, and also by the simple fact that they used the term "separate charge" when everyone knows when you speak of a utility, that under the law you cannot have a charge, if you are a utility, which is not in the tariff. It is a violation of Section 92 of the Public Service Law to do that.

I wanted to make the further point that it is not just that the charge must be in the tariff. It is also that the state regulatory authority, if it feels that it would not be just and reasonable to permit the rate to be separated for excise tax reasons, to refuse to permit that. The Colorado Public Utilities Commission did just that, in 1972.

Alternatively, the state commission has the authority, again, if it feels that this is just and reasonable and in the best interests of all telephone rate payers, not just Centrex customers, to require that the separation be made but that the rate level be raised so as to soak up the tax saving so as to make up some of the revenue loss which it finds that the telephone company is making on Centrex service. And the New York Public Service Commission did just that this last fall with respect to a non-Bell Telephone Company.

So that the division between state and federal authority in this area is that Congress recognized that the state commissions have plenary jurisdiction to determine what charges there shall be, and that those charges are expressed in the tariffs filed with the state commissions.

Congress in those instances -- we set these forth in point 2 of our brief -- where it has wished to deliver some mandate to state regulatory authorities with respect to the tax areas, has done so gingerly and it has done so expressly in terms that have left nothing to the imagination.

Nothing of that sort has been done here.

So that our contention, put very simply, your Honor, is that all Congress intended to do was to impose a tax upon the charges as they were found in the tariffs filed with the state regulatory authorities. Any question as to whether those tariffs should be changed in response to any reasons, including federal excise tax reasons, was intended to be left where it always had been: subject to the jurisdiction of the state commission.

THE COURT: Well, this then adds up to your initial argument that in order to effect a separation of charges, the defendants, at least the operating companies, were required to revise tariffs with the state regulatory agencies and that the defendants could not, by a bookkeeping entry on there own, effect a separation of charges, That it had to be done by filing a new tariff schedule.

MR. STRUVE: That is correct, your Honor. And I should say this is more than our legal argument as we stand here before your Honor in the courtroom. This was the consistent position of all of the Bell System's tax attorneys during the entire period that we are talking about.

THE COURT: That may be their position, but that wouldn't necessarily be the law, you know.

MR. STRUVE: No, but when we are asking questions relating to what were in the minds of the AT&T staff people who are non-lawyers, and relating to: should they have understood that perhaps if this were true it could be done without filing tariffs, I think it is of the utmost importance to realize that the consistent advice which they received throughout the period and relied upon in complete good faith was that it had to be done by tariffs.

THE COURT: All right.

MR. STRUVE: If I might, your Honor, I would like to focus but briefly upon the antitrust issues, because it seems to me, with respect that, Mr. Nickerson has failed to make clear the essential nature of the issues of fact before your Honor on the antitrust claim.

When plaintiffs originally filed their complaint, they alleged that the intent of the defendants in not establishing separate Centrex station charges before 1971 was to thwart competition from the interconnecting industry; and on the basis of that allegation they allegednot only a Sherman Act Section 1 claim but a Sherman Act Section 2 claim.

As the marked pleadings that were submitted to your Honor show, those allegations have been unambiguously withdrawn, and plaintiffs now concede that there was no purpose or effect of restraining competition of any person with the defendant.

Therefore, the Sherman Act Section 2 claim has been withdrawn. Plaintiffs now press only a Sherman Act Section 1 claim, which has also changed in character.

Their claim now is that if they established a conspiracy among the defendants to maintain a uniform Centrex rate structure and not to establish separate Centrex station charges, they would thereby have established without more, and particularly without showing anticompetitive purpose or anticompetitive effect upon any relevant market, a per se violation of Section of the Sherman Act.

Now, for the reasons set forth in the point 1 of our main brief, we submit that that fails as a matter of fact for a number of reasons. Let me focus now upon two.

One is that, as your Honor knows, and it is stipulated in the fact stipulation, there is no question about it, each of the defendant operating companies, by law, within its own operating territory, is the only company that can render Centrex service. So that not only did the operating companies not compete with each other in rendering Centrex service, but there was no way they lawfully could.

The cases are clear that you cannot have a horizontal agreement in violation of Section 1 of the Sherman Act among companies that do not compete. One good example of that is the U. S. vs. Columbia Pictures case in this court in 1958.

Plaintiffs admit that we are not dealing here with a case of restraint upon competition, as they say, in the normal sense. They do argue, however, that there was an indirect intent upon the part of AT&T and the defendant operating companies to restrain competition. This is where the difference between Centrex-CU and Centrex-CO comes in. And because this is their only claim of anticompetitive purpose or effect left in the case, I hope your Honor will pardon me if I try to lay out what the claim is, what evidence supports it -- or, if I may put it more clearly, what evidence does not support it.

Plaintiffs' theory is one that was first enunciated, so far as we know, in the deposition of plaintiffs' expert, Professor Arthur D. Hall. Professor Hall said that he was able to testify that the reason why the AT&T rate people did not recommend a separation of charges to the operating companies was that they were concerned that if revised tariffs were filed, the state regulatory authorities would discover two things about the existing Centrex tariffs: First, Professor Hall claimed that the state regulatory authorities would discover that those tariffs were excessive in amount.

THE COURT: Were what?

MR. STRUVE: That the Centrex rates were excessive in amount.

THE COURT: Excessive. All right.

MR. STRUVE: And second he claimed that the state regulatory authorities would decide, on examining the question, that there were so many differences between

Centrex-CO and Centrex-CU that the two services should be split apart and that a single rate level should not be established for both services together.

THE COURT: In other words, there should be different charges made to the services in each instance.

MR. STRUVE: That is correct.

So that a person who took Centrex-CU would pay a different charge for each station than a person who took Centrex-CO. And then of course there would still remain as an independent question whether those charges should be separated for federal excise tax reasons.

Let me return, though, to Professor Hall's contentions. Professor Hall admitted that he was not claiming that any operating company was actuated by either of these motives, and there is no such evidence. Professor Hall did not claim that there was any direct evidence that anyone at AT&T was actuated by a fear that Centrex rates were excessive or discriminated against Centrex-CU customers. And your Honor will find there is no such evidence.

Rather, Professor Hall's contention was that for reasons which he expressed at great length in his deposition, it was indeed a fact, in his opinion, that the Centrex rates of the defendant operating companies were excessive in amount and were discriminatory, and that therefore it could be inferred -- and he offered the inference -- that the AT&T people who did not recommend the separation until 1971 were motivated by that concern.

I should add that Professor Hall admitted that he is not an expert in telephone rate regulation, in telephone revenue requirements, in marketing or in tariffs. And at one point in his examination he said that he didn't care what the state regulatory authorities would actually do.

Now, with the argument that the defendant operating companies' Centrex rates were excessive and unjustly discriminatory, which is now the focus of their antitrust claim, plaintiffs have come full circle, because now in effect they are asking your Honor to determine that at some time during the 1960's or early 1970's state regulatory authorities applying the standards of justness and reasonableness and unjust discrimination, which are found in state regulatory statutes, would have held that Centrex rates were excessive and discriminatory.

We set forth in our brief the express

statement made by the plaintiffs in their briefing of the class action motion that they were not attempting to try a series of state rate cases. If, however, plaintiffs do wish to tender the issue as to whether Centrex rates were excessive and discriminatory, we are glad to meet them on that ground as well.

THE COURT: Well, I am not trying a rate-making case, am I?

MR. STRUVE: Nevertheless, your Honor, in order to understand, for example, why it is that the difference between automatic and non-automatic number identification is deemed by plaintiffs to be material, this is what we have to go through to get to that point.

On the point of excessiveness, plaintiffs' claim that the Centrex rates were excessive is based upon the fact that in 1961, when the service was being introduced, AT&T pointed out in its rate recommendations that there were companies whose PBX rates, because they had not been updated to keep up with cost increases, might reflect an inadequate rate of return.

AT&T pointed out that if that were the case a company should try to be sure that the Centrex rates reflected an adequate rate of return so that they would not carry over the inadequate PBX rate of return and thereby further burden users of other telephone services, including basic residential telephone services.

Plaintiffs' contention is that if a defendant operating company did that, thereby it would have a higher revenue increase for Centrex above PBX than the cost increase, and that, say the plaintiffs, would have led a regulatory commission to conclude that the Centrex rates were excessive.

Well, now, we know what a regulatory commission would have concluded on this point, because the U. S. Government, acting through the General Services Administration and the Department of Defense, made precisely this argument to three regulatory commissions.

In one commission the complaint was allowed to die, it was not prosecuted. In the other two commissions, the complaint was dismissed on the merits; the commissions upheld the Centrex rates, and in a case that was appealed to the court, the court affirmed.

Now, the claim of unjust discrimination, on the other hand, is based upon the fact that there were some minor differences between Centrex-CU where the switching equipment was on the customers' premises, and Centrex-CO, where the switching equipment was in the telephone company's central office. Mr. Nickerson has named most of them.

For a number of years, in the early 1960's, because the switching equipment was not available to render automatic number identification service through a step by step Centrex-CU switching equipment on the customers' premises, it was rendered on an interim basis by having the customer pass on the number orally. Since then, automatic number identification has become available for Centrex-CU as well as for Centrex-CO.

The other differences, of course, relate to the fact that in the case of Centrex-CO the equipment is on the telephone company premises, whereas in the case of Centrex-CU it's on the customer's premises, but that is fully compensated for by an additional charge paid by the Centrex-CO customers.

There remains the question of: Was there a difference in cost between the two methods of rendering Centrex service? Mr. Nickerson said in his opening statement that it was much more expensive to render Centrex-CO than it was Centrex-CU. Your Honor will find from the testimony that to the extent that this was so, and we have no direct evidence, we only have what AT&T assumed in 1961 -- to say that it was much more expensive is a gross exaggeration.

But whether these minor differences existed is not the point. The point is that no commission would have deemed these differences to call for a difference in treatment, with one exception which I will come to in a minute, which was for very different reasons.

It happens all the time that one customer may be served from a different type of equipment or with a slightly different method of service than another. I am sure your Honor will recall that there was a period during which direct distance dialing was available in some areas of the state, while direct distance dialing was not yet available because of the massive capital expenditures required in other areas of the state.

So for a period of years some customers were getting automatic billing identification on toll calls, while other customers had to pass the number on to the operator until they too were converted to direct distance dialing.

The point that is relevant here is that no commission has ever distinguished between these methods. Similarly, no commission has ever distinguished among the costs for what is the same service, on the basis of different charges for one type of switching equipment rather than another.

These are differences of a kind that, if rate regulation is to be practical at all, must be melded into an overall average.

So whether you look at plaintiffs' claim of excessiveness, or the claim of discrimination -- and we will explore the merits of these claims in great detail when Professor Hall testifies -- the fact is that there was no concern, because there was no reason for concern that any commission would hold that they were either excessive or discriminatory, with one exception, and I wanted to come to that.

The Colorado Commission in 1972 took a different approach to Centrex-CO service. Your Honor will recall that Mr. Nickerson explained that in the case of Centrex-CO there is a direct line from each Centrex telephone to the telephone company central office, rather than as in the case of Centrex-CU only a direct line to the switching equipment on the customer's premises, and then a smaller number of trunks which connect the switching equipment on the customer's premises to the telephone company's central office.

The Colorado Commission made the observation that because there is a direct line from each of the customer's telephones in the case of Centrex-CO, from an engineering standpoint it looks very much like an equivalent number of individual business lines. At that point the Colorado Commission observed that the charge for each Centrex-CO line was substantially less than the charge for an individual business line.

Now, the telephone company involved tried to explain that there were valid cost reasons for that. The Colorado Commission took the view that regardless of what the cost reasons might be, it felt that the charges should be the same, so it increased the Centrex-CO line charge by approximately a factor of three in order to make them the same.

Now, the only factual issue that I have left to cover, and I will try to do it very briefly --

THE COURT: You are going much over the time that I suggested. Why don't you bring it to a conclusion? Go ahead.

MR. STRUVE: I am sorry, your Honor, but

because the issue of conspiracy is so central to plaintiffs' case I think it is essential to set forth the factual background against which the proof must be assessed.

The relationship between AT&T and the defendant operating companies had its own service territory to cover and meet the needs of. Those territories are extensive, and within those territories the defendant operating companies determine their own policies, including rate policies, in light of their own business judgment and in light of AT&T's recommendations.

Since the 1880's, pursuant to license contracts, AT&T has acted as source of important advice and information --

THE COURT: Mr. Struve, you have set that all forth in your brief, haven't you? That is all in your brief, isn't it?

MR. STRUVE: I didn't think it all was.

THE COURT: You are over your time for an opening statement.

MR. STRUVE: Your Honor, I will close here.

THE COURT: Before you sit down, Mr. Nickerson introduced his associates to the table, and some sitting at your table handed you notes during the course of your argument. Why don't you introduce them to the Court?

MR. STRUVE: As your Honor suggested, I will close here and we will get to the proof.

THE COURT: You didn't hear what I said. I said Mr. Nickerson introduced his associates.

MR. STRUVE: I am sorry, I should do that.

THE COURT: And I said some of the people sitting at your table handed you notes and I think you ought to introduce them to the Court so we start on an even basis.

MR. STRUVE: I apologize, your Honor. I should say that my hearing aid does not always do an adequate job.

MR. STRUVE: Yes, I hear you. I just say I hope your Honor will remember that if I seem unresponsive it almost always is because I haven't heard what your Honor said.

THE COURT: I will bear that in mind.

MR. STRUVE: From Davis Polk, Hiram Gordon, Gordon Harriss and Richard Cunningham.

And from the legal department of American

Telephone & Telegraph Company, Burton Katkin and Victor Gomperts.

THE COURT: Thank you. We will take our mid-morning recess now.

(Recess)

(Continued on next page)

4A a.m. mpltl

THE COURT: Proceed, please.

MR. NICKERSON: Your Honor, before I proceed with the proof, may I just say one sentence about the antitrust claim?

The antitrust claim which we are asserting is not the one which Mr. Struve attributed to us. We aren't going to undertake to prove before your Honor that the rates were excessive or discriminatory.

Our antitrust claim is that the parties agreed to maintain the Centrex rate structure and that they did that and did not unbundle the rates in order to maintain the level of them, because they were concerned -- and we will show this by documentary evidence and by depositions, that those rates and the rates of the phone companies generally might be attacked and that is a violation of the Sherman Act, and the motives will be shown, your Honor, by the documents and the depositions.

Your Honor, may I then proceed with the proof?

THE COURT: Yes.

MR. NICKERSON: First, your Honor, may I offer the stipulation of facts which your Honor has so ordered, dated February 28, 1977, a stipulation as to documents which your Honor has so ordered, and that is dated the same date.

I would like to just explain a little something

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about the stipulation as to documents, if I may.

THE COURT: All right.

MR. NICKERSON: I think it will make it easier for your Honor.

The stipulation as to documents contains 271 paragraphs. The first 268 refer to documents that have been marked for identification. Each paragraph number corresponds to the number of the exhibit marked for identification, and they serve in many instances, your Honor, to identify the exhibit.

Furthermore, in paragraph 269, we have stipulated various things with respect to the documents in sub-paragraphs A through F of that, for example, except for five documents in 269B, that they were concerned with matters within the scope of the employment and so forth.

I won't refer, your Honor, unless your Honor wishes me to do so, to each paragraph of the stipulation of documents as I introduce it, unless some controversy arises with respect to the document, but all of them that I am now going to introduce are now referred to in that stipulation and set forth certain facts with respect to who sent the document, what the title of the person was and to whom it was sent, where we know that.

Now, your Honor, I won't go into detail about the

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fact stipulation. The first five paragraphs of it simply identify the action, that a class action determination has been made, and it identifies the three plaintiffs.

Paragraphs 6 and 7 of the fact stipulation identified AT&T and it identifies the operating companies.

Attachment A, which is referred to in paragraph 7 of the stipulation, shows the state of incorporation of each of the operating companies, the percentage of capital stock which is owned by AT&T of each of the operating companies, the states where services are rendered and the state or local regulatory authorities.

The only thing I draw to your attention on that, your Honor, is to note with respect to Cincinnati Bell, that AT&T owns only 26 percent of that stock, and with respect to Southern New England Company, AT&T owns only 18 percent of the stock.

Paragraph 8 of the stipulation recites that each of the-- I'm not purporting to quote exactly, just for your Honor's convenience -- that each of the operating companies are managed by their own board of directors, and it says that one member of the board of each of the operating companies except Cincinnati Bell is an officer of AT&T.

Paragraph 9 of the stipulation shows that each of the operating companies connects with the facilities of

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the other and with the AT&T facility, particularly the long lines department, and that the defendant operating companies serve about 80 percent of the nation's telephones.

Paragraph 10 refers to the fact that the charges of the operating companies for interstate calls are subject to the Federal Communications Act, the Federal Communications Commission and that the amounts received by each of the defendant operating companies as compensation for the use of unrestricted Centex stations are not charges for interstate communication service and are not subject to the Federal Communications Act.

Paragraph 11 gives you the other side of that coin that the amounts received as compensation are subject to regulation by the state or local regulatory authorities, that is, compensation for use of unrestricted Centrex stations, that those rates were set forth in tariffs filed with the regulatory authorities, and it says, your Honor, that plaintiffs will not contest that each of the defendant operating companies complied in every respect to the tariffs relating to the Centrex charges.

Paragraph 12 points out that within its service area each of the operating companies is the only telephone company which is authorized under the applicable laws of the state to render Centrex service and within the service mpt 5

areas the only company which renders Centrex service.

Paragraph 13 identifies Western Electric, which is the manufacturing arm of the Bell System. It is owned 100 percent by the AT&T, and identifies Bell Laboratories, which is owned 50 percent by AT&T and 50 percent by Western Electric and recites that together with the operating companies of AT&T they are known as the Bell System.

Paragraph 14 simply relates to advances of funds over the relevant period by AT&T to Cincinnati Bell and Southern New England. Those were the two companies, your Honor, in which AT&T did not own the controlling stock.

Now, your Honor, I now offer as a group, Exhibit 1A through 1E.

May we give an extra copy to your law clerk?

THE COURT: Yes. That would be very helpful. Just give it to the court clerk first.

MR. NICKERSON: Your Honor, these simply are the license agreements, as you will see from Paragraph 1 of the stipulation as to documents. These are the license agreements that are entered into between AT&T and each of the operating companies. These license the operating companies to use the patents, they obligate the AT&T to prosecute research and development, to maintain arrangements for the manufacture of equipment, to obtain financing on reasonable terms for the operating companies and so forth, and it provides that the licensees have the right to interconnect, and it also refers to the amount that the operating companies will pay as 2-1/2 percent of their gross earnings as compensation to AT&T.

Next, your Honor -- I offer those, your Honor.

THE COURT: Any objection?

MR. STRUVE: Your Honor, with respect to a large number of the proposed exhibits of which this is one, we stated in paragraph 7 of Appendix E of the pretrial order, that if we had no objection, upon the express understanding that the document is offered for its content and not for the truth of any matter that might be asserted therein and that is our position with respect to these exhibits.

We understand that they are being offered for the fact that they exist and not for the truth of any matter that may be contained therein.

THE COURT: That is a little odd in light of the first exhibit that has been offered. This is a communication which is internal and you say it cannot be considered for the truth of the contents?

MR. STRUVE: What we wanted to do because of the volume of exhibits in this case was to divide them into two categories, those that are being offered for the truth of some statement therein, as to which we would have to focus upon that statement, and those that were being offered merely to prove their existence. The licensing exhibits 1A through 1E fall into the latter category.

This is an example of the job that would have been involved if we had had to check the truth of the statements therein.

The rates set forth were accurate in the 1930s, bu have been superseded in another agreement, which will be introduced by the plaintiffs in a moment.

We have tried to separate these exhibits into two groups, and as to those which we understood it wasn't important to the plaintiffs that we try to validate the statements therein, we took the position that I have just expressed to your Honor.

THE COURT: All right. Is there anything that is in dispute about Plaintiff's Exhibit 1A?

MR. STRUVE: We understood it, plaintiffs offer it only for the fact that it exists in substantially the same form between AT&T and the operating companies.

MR. NICKERSON: Your Honor, I have offered it for all purposes, and I didn't understand that I was restricted in offering it.

As a practical matter, I don't think there is anything in there that I would offer for the truth of the

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matter stated, but these are agreements between the parties and that's it.

I don't think there is a proposition of fact, for example, that that agreement states that I am offering it for.

I am a little puzzled, as your Honor is --

THE COURT: I am puzzled, too. I must say, Mr. Struve, that I don't understand your position. Perhaps you ought to clarify it for me.

The plaintiff has offered an agreement between the parent company, in most cases the parent company holding 100 percent of the stock, and South Western Bell Telephone Company.

Now, what are you reserving on with respect to that agremeent? This is an agreement between two corporations that you represent. What isn't factual about it? What is the point you are making? That is what I am trying to get.

MR. STRUVE: Let me give your Honor an example:

If you look at Appendix A which begins on page 13 of Exhibit 1A, your Honor will see an elaborate schedule of commissions to be paid to AT&T on outgoing and incoming calls. Those schedules have been superseded by schedules --

THE COURT: They are valid as of the date set forth. If they have been superseded, offer the superseding document. What are you disputing about this?

MR. STRUVE: We are not disputing anything, your Honor. We are saying that as to approximately 200 documents, we understood that they were being offered not for the truth of them, but only the fact that they existed. On that understanding we had no objection.

THE COURT: What is the relevance if, taking it in your terms -- I must say that I am puzzled by this. Somebody better explain it to me.

This is a document, an agreement entered into between two defendants. I don't know the significance of what you are reserving on, but if there is any significance you ought to make it clear to me.

Is there anything in that agremeent that is not factual, anything that is not true? If so, set forth what your position is with respect to it.

MR. STRUVE: Your Honor, we understood that the plaintiffs were offering this document only for venue purposes to show that the document existed between AT&T and the operating company where it was made.

THE COURT: Is there such a reservation in the stipulation?

MR. NICKERSON: No, your Honor.

MR. STRUVE: The stipulation refers only to--

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THE COURT: Let me see it in the pretrial order.

Of course, if you were taking this position with respect to documents or offered exhibits that involved third parties, I would understand that. But I must say I am only mystified about the factual content of an agreement between two defendants. I would understand it with respect to third-party documents.

(Pause.)

THE COURT: Show me the pretrial order where that reservation is made.

(Pause.)

THE COURT: Well, I must say, somebody will have to clarify this.

Paragraph 7 reads:

"Subject to paragraph 6 above" -- it almost reads like a trust indenture -- "defendants do not object to the introduction of" -- about a hundred exhibits, "and of the last four documents listed in this appendix upon the express understanding that each such exhibit is offered only for the facts stipulated with respect to such exhibit in the stipulation as to documents dated February 27, 1977 and not for the truth of any matter asserted in such exhibit."

Now, what does that mean, it is offered only for the facts stipulated with respect to such exhibits and

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not for the truth of any matter asserted therein?

Gentlemen, you drew the stipulation. You better explain to me what you had in mind.

MR. NICKERSON: That was his reservation, not mine, your Honor. I offer it for all purposes.

THE COURT: Well, you are bound by the stipulation, aren't you, whatever it means?

MR. NICKERSON: No, that is not a stipulation that I agreed to, your Honor. That is simply a reservation by the defendants of what he is going to object to.

THE COURT: It is contained in the pretrial order.

Well, let us proceed. I will take the exhibits, and then we can argue about it later if there is an issue. We will be here until Kingdom come if we keep on this way.

MR. NICKERSON: I offer Exhibit 7M, which is an AT&T annual report. This simply gives the background of the Bell System, the manner in which it operates. I would like to draw your Honor's attention at this point only to page 11680 and 11681.

I should explain to your Honor that the documents I am going to introduce almost without exception come from the files of the defendants and on each page of the documents which they have produced they have stamped what is called a production number. This was done for convenience in

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depositions, and I will refer in the offer to the number stamped on the documents. That simply shows the organization of the Bell System, the fact that the Executive Policies Committee meets almost monthly with the presidents of the associated companies and then sets the policies of the Bell System.

I offer that, your Honor.

MR. STRUVE: Objection on the grounds it is irrelevant. The document does not say that the Executive Poli Committee sets any policies with respect to Centrex service, and there is evidence to the contrary.

I should also point out that the 1972 AT&T annual report is only one of the approximately ten or twelve annual reports that are being offered, and I haven't heard any justification for the relevance of the other ten or eleven.

MR. NICKERSON: I haven't offered them, your Honor, and I don't intend to. I am trying to cut it down for your Honor.

THE COURT: Well, first with respect to this exhibit, are you challenging this exhibit on the basis you challenged a prior exhibit, that you didn't want it offered for the truth of any matter asserted therein? How can you possibly take that position with respect to this? Now you are objecting on grounds of lack of relevance, is that it?

Well, since I am sitting in the trial of a non-jury case, following my usual rule, unless there is an extraordinary instance of egregious lack of relevance, I will take it. Everything is received with the understanding that in coming to my determination of factual issues I will only consider matters that are relevant.

MR. STRUVE: I should also state that this exhibit is an AT&T document. As to all of the exhibits that are offered, in cases where they are documents that were not prepared by or did not go to all of the defendants, we would like to have a standing objection to their receipt against any defendant that did not prepare them or receive them.

THE COURT: Well, they would be received subject to connection, since in this case there is a charge of conspiracy.

If the Court decides that there is enough evidence submitted to the trier of the fact as to whether or not a conspiracy does exist and whether or not an individual defendant was a member of the conspiracy, I will rule accordingly.

That would be under U. S. vs. Geaney, 417 Fed. 2nd -- I am not sure of the number of the citation.

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MR. NICKERSON: I would now like to read from the deposition of Mr. Alvin von Auw.

Would it be appropriate if my partner sat in the witness chair and read the answers?

THE COURT: It will be more than appropriate. It will sound much better. I think everyone in the court will appreciate that.

MR. NICKERSON: Your Honor, may I give you the excerpts that I am going to read, and a copy to your law clerk, and I will give a copy to Mr. Struve.

THE COURT: Well, he has his own copy, doesn't he?

MP

MR. NICKERSON: I have it conveniently packaged. Starting with page 3, line 14 --

THE COURT: You haven't told me who the witness is.

MR. NICKERSON: Yes, your Honor. Alvin von Auw.

"Q Tell me, what is your present position in the Bell System?

"A I am vice president and assistant to the chairman of American Telephone & Telegraph Company.

"Q And what are your functions and duties and responsibilities in that job?

"A Well, my functions are to perform such duties as the chairman from time to time assigns to me. In the main, they involve assistance to him in the preparation of public statements, speeches and talks.

"The preparation of the company's annual report and its quarterly reports to its share owners in addition to which I serve as secretary to the company's executive policy committee.

"Q How long have you held that position?

"A I held the position of vice president and assistant to the chairman since 1969."

Turning to page 28, line 6:

"Q Are you a director of any companies in the Bell System?

MP 2 "von Auw

"A I am currently a director of the Southern New England Telephone Company.

"Q Have you ever been a director of any other Bell company?

"A I have been a director of the Chesapeake & Potomac Telephone Company of Maryland."

At page 29, line 10:

"Q Did you, and do you get compensation for serving as a director?

"A I do not.

"Q Are there other AT&T officers who have served on the boards of the operating companies?

"A Yes, with the exception of the Cincinnati Bell Company.

"Q Is there more than one AT&T officer on any of those boards?

"A I am not aware of any operating telephone company with more than one AT&T officer on its board of directors."

Page 51, line 9:

"Q I take it that from time to time there are conferences within AT&T and perhaps within the Bell System. In fact, I am pretty sure there are from the records I have seen.

"Have those names, the various kinds of conferences?

MP 3 "von Auw

"A There is a twice a year presidents conference, the membership of which comprises, not unnaturally, the presidents of the associated companies and the officers of AT&T.

"Q Just tell us what is done at that conference, typically.

"A Generally the agenda is made up of major current concerns of the business in the service and operations area notably, and also in the regulatory area.

"Q Are agendas distributed in advance?

"A I try to.

"Q You are the one who prepares those?

"A I construct them out of recommendations made by the officers of AT&T and more particularly the recommendations of the members of the executive policy committee.

"Q Are there other kinds of conferences other than the presidents conference?

"A On an on-call basis these same people -- that is, the presidents of the associated companies and the officers of AT&T--may meet for one-day meetings which I try to differentiate from the presidents' conference as such by calling them presidents meetings, but they are generally on an ad hoc single subject basis.

"Q Any other conferences?

MP 4 "von Auw

"A The major departments of AT&T characteristically have annual meetings with their coordinates in the associated companies."

Page 55, line 20:

"Q . . . Are transfers from one company in the Bell System to another company common?

"A Yes."

Moving to page 56, line 15:

"Q Now, we talked a little while ago about the AT&T officers that sat on the board of the operating companies.

"Do those officers ever meet as a group?

"A Tney coincide virtually with what we call 'The Cabinet,' which is comprised of the officers of AT&T. The officers meet together; those of them available."

MR. STRUVE: Your Honor, may I interpose an objection? This is on the grounds of relevance. At the end of the extract from this deposition, Mr. von Auw makes it clear that Centrex was never discussed by the AT&T Cabinet.

THE COURT: Well, Mr. Struve, I think you know the rule, that is, the Federal rule of civil procedure under which, if there is any portion of this deposition that is omitted and which you think should be included as a matter of fairness, you have a right to request that it be read or read it into the record yourself.

MR. STRUVE: My point here goes to relevance. We are talking about a group here which, the testimony is, never discussed Centrex.

THE COURT: You say that comes at the end of this whole testimony. How can I jump the gun now and see what is at the end until the prior part has been offered?

MR. NICKERSON: Continuing at page 56, line 21:

"Q You mean all officers of AT&T or just certain ones?

"A All officers.

"Q That's called the cabinet?

"A Informally.

"Q That is a new one to me.

"How often does the cabinet meet?

"A Every two weeks.

"Q Are minutes kept of those meetings?

"A No, they are not.

"Q Do you attend those meetings?

"A When I am on premises, yes.

"Q Is that most of the time?

"A Recently it has been.

"Q Generally speaking, what is discussed at cabinet meetings?

"A Characteristically, cabinet meetings consist of,

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in effect, going around the table to each member present and eliciting from him what may seem important to him that his colleagues know about.

"Q From time to time, will that relate to the operating companies on whose boards they sit?

"A I can recall no instance in which there has been a cabinet report by an officer with respect to the deliberations of the board on which he sits. There has been discussion in the cabinet meeting of the role of the AT&T officer on associated company boards of directors as a general briefing on behalf of those who may be new to this function.

"Q Tell me what that briefing is, in general.

"A It generally consists of reminding the officers of their opportunities for spokesmanship to their fellow directors on issues not special to that company, but which may affect the Bell System as a whole of which outside directors may be aware only, for example, by reading the newspapers.

"Aside from the officer's role, fiduciary role, as a director, he has the opportunity on the occasion of his visit for a board meeting to inform himself with respect to the operations of the company that he helps direct and to inform the president and the officers of that company of system-wide developments.

"Q Is the nature of that briefing set down in any writing?

"A Yes. Broadly speaking, in a memorandum prepared by the secretary.

"Q And that's revised from time to time?

"A I am aware of only one instance in which it has been distributed.

"Q When was that?

"A Six months ago.

"Q Are the officers of AT&T who sit on the boards of the operating companies on the executive committees of those operating companies, if they have them?

"A I have not been, and I don't know with respect to the others.

"Q How are the presidents of the operating companies selected? I take it they are voted for by the boards?

"A Yes.

"Q Are any recommendations made to the board as to who should be president of an operating company?

"A Yes.

"Q Who makes those recommendations?

"A They may be made and from time to time have been made by the AT&T officer who serves on that board.

"Q Anyone else?

"A I am not aware explicitly that anyone else may have made those recommendations. Generally, they have the concurrence of the top management of AT&T, including the chairman of the board, and he may have, I have no personal knowledge thereof, discussed the matter with one or more of the directors.

"Q Let me see if I understand what you said.

"Where an AT&T officer sitting on the board of an operating company recommends someone to be president of the operating company, that first comes before the, I think you said, top management of AT&T?

"A No.

"Q I misunderstood you, then.

"A I did not intend to say that as a specification by any means. I said it may have been discussed among some of the members of the top management of AT&T.

"Q I'm sorry, I probably misunderstood you. I thought I heard you say that they have the concurrence of top management.

"A They have the concurrence of the chairman of the board.

"Q How is it brought to his attention, then, that someone has been recommended for president of an operating company?

"A Well, the recommendation may be made to him by a president at the point of retiring or on the point of transfer to some other responsibility, which recommendation is necessarily weighed against the qualifications of other candidates for that post in that company and in other companies.

"Q I am still not sure I understand you. Excuse me for pursuing this.

"In each instance prior to the time someone becomes president of an operating company it has the concurrence of the chairman of the board of AT&T, am I correct in that?

"A I am not aware of instances where that has not been true.

"Q Are you aware of instances where the chairman of the board who received a recommendation, let's say, from a retiring president of an operating company turned down that recommendation, or did not concur in that recommendation?

"A I am sure that there have been such instances, but I cannot readily bring one to mind.

"Q Now, the operating companies are all, as far as you know, separate corporations separately organized, are they not?

"A Yes, they are.

"Q And they are independent companies, are they not, in the sense that AT&T does not order them, or an officer of AT&T does not order them to do something, is that correct?

"A That is correct.

"Q But if I heard your testimony and if I have read the documents right, they received advice from AT&T from time to time?

"A That is correct.

"Q And just generally what does that advice concern?

"A For the most part, it concerns the operation of the business and the provision of its services to customers.

"Q And that would include marketing and rate planning, I think you told us, is that correct?

"A Yes, it would.

"Q And it would include regulatory matters?

"A Yes, it would."

Skipping down to line 20 on page 62 --

MR. STRUVE: Will you please read lines 11 to 18?

MR. NICKERSON: There is no answer there. I will be glad to read that, your Honor. The question was:

"Q And would you say that generally speaking the advice that's given by AT&T to an operating company is accepted?

"MR. STRUVE: I object to that question on the ground that it is so general, so vague and so ambiguous as to be unanswerable."

I should have stuck to that.

"MR. NICKERSON: Let me try a more specific, less ambiguous question.

"Q Are you aware of any instance in which an operating company rejected the advice of AT&T?"

MR. STRUVE: Your Honor, we object to that on the same ground as we objected to the previous question and on the additional ground that it is irrelevant, because the stipulated facts make it clear that in numerous instances the operating companies did not follow AT&T's recommendations with respect to Centrex, and Mr. von Auw made it clear in his deposition that he had no knowledge with respect to Centrex.

THE COURT: The objection is overruled. I have already stated that I will only consider relevant evidence. Moreover, this will be received to show the relationship between this defendant and American Telephone and Telegraph Company and other defendants.

MR. NICKERSON: Continue, on page 62, line 22:

"A I am not aware of an instance in which there

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has been an explicit rejection of the advice of AT&T. The virtue, however, of the so-called federal system, which governs the relationship between AT&T and its associated companies is that it enables the operating companies the latitude of decision with respect to particulars of timing, for example, and to reflect in their own decisions the particular circumstances applicable to their territories.

"Q But on basic policy issues, is it your impression that the operating companies accept the recommendations of AT&T?

"MR. STRUVE: I object to that question on the ground that it is so vague and ambiguous as to be unanswerable.

"Q Did you understand the question?

"A Yes, I understand the question.

"Q Would you answer the question."

MR. STRUVE: I would like to object to the question on the ground that there is no showing that Centrex was one of the major policy issues about which the witness spoke in his answer, and, as I mentioned before, he testified that Centrex wasn't discussed by the groups he was speaking about.

THE COURT: Well, I have suggested to you several times that you read the answer of the defendant to which I have just made reference. Now, I don't know what your stipulation was. I will sustain this objection on the ground of form, but I think you waived form under the usual stipulation; did you?

MR. NICKERSON: Yes, your Honor.

THE COURT: Overruled.

That would have been, I think, a sound objection.

MR. STRUVE: I'm sorry, your Honor. I didn't hear you.

THE COURT: That would have been a sound objection, in my view: The form of the question.

MR. STRUVE: You said something about waiving objections?

THE COURT: Let your associate tell you what I said, if you are having trouble hearing me. I can't speak so loud.

MR. NICKERSON: May I proceed, your Honor?

MR. STRUVE: Your Honor, I believe I made an objection as to form on the record in the deposition.

THE COURT: Where is it as to form?

MR. STRUVE: I said it was vague and ambiguous.

THE COURT: Well, I will take it. We are wasting time. The case isn't going to turn on this.

(READING:)

"A I will answer it this way in that recommendations "von Auw

on major policy issues affecting the entire Bell System have customarily been discussed on a system-wide basis and the associated companies themselves have had the opportunity to make an initial input of their experience and views with respect to the advice that is subsequently conveyed to them.

"Q So taking the analogy which you used of the federal system, they have had representation, so to speak, in that decision?

"A Yes, they have.

"Q And for that reason, if I am understanding you correctly, they don't feel badly in accepting the advice, is that correct?

"A I am not aware that they have felt badly."

Moving to page 67, line 12:

"Q You mentioned the operating companies participate in the policy decisions which affect all of the Bell System.

"How is that done? Are there regular meetings to discuss those?

"A There are the meetings that I reviewed earlier at the presidential level, the presidents conferences and the presidents meetings, which are, as I indicated earlier, on an ad hoc basis.

"Q How frequently do those occur? I don't think you testified to that.

"von Auw

"A I will say in addition to the semiannual five-day conferences probably five times a year.

"Q Anything else?

"A In addition to those, there are the departmental conferences characteristically on an annual basis. Sometimes more often and sometimes called again on an ad hoc basis.

"Q Anything else?

"A I can't readily think of anything else.

"Q Where are those conferences held?

"A They are held variously in various parts of the country. The presidents conferences are usually held in hotels in salubrious parts of the country.

"The presidents meetings are held recently more often than not in New York City either on our own premises or in a hotel, but fairly often in other cities at airport motels, for example, that may be convenient for people to get in and out conveniently.

"Q And during the period while you have been at AT&T -- well, let's take the period 1965 through 1972 -- how many times were those conferences that you have referred to held in New York?

"A Let me first of all talk about the presidents conference, the semiannual one.

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"Q Yes.

"A I may be wrong, but I am not aware of any having been held in New York City.

"Q New York State?

"A Or New York State either.

"Presidents meetings, the ones that I said have been held five or six additional times a year, I will surmise that two-thirds of them have been held in New York State. I don't think there is anything I can add to that.

"I should point out that the presidents meetings were not institutionalized, so to speak, until, perhaps, 1971.

"Q Prior to that time, 1971, how did the operating companies participate in the policy decisions?

"MR. STRUVE: I object to that question on the grounds thatit has been asked and answered.

"MR. NICKERSON: No. He said, I think, and I may be wrong here, but I thought he said that this was instituted in 1971. Maybe I misunderstood.

"A The presidents meetings as distinguished from the presidents conferences.

"Q So that they did meet in the presidents conferences let's say, from 1965 or before that, maybe back to the time of Alexander Graham Bell?"

MR. NICKERSON: Sorry, your Honor. That wasn't a good question.

"A Yes.

"Q Now, are you familiar, personally familiar, with how the so-called Centrex service was developed?

"A No, I am not.

"Q Didn't you become familiar with that at all during your time with AT&T?

"A No.

"Q Didn't you hear anyone talk about it?

"A I have heard the word Centrex used from time to time, but I havenot been a participant in any discussion of the development of the service or a discussion of its nature or the rates applicable thereto.

"Q Has anyone in AT&T, or the Bell System, talked to you about why the charges for intercommunication and exchange access were packaged?

"A No. The only discussion that I can recall on this matter at all was occasioned by the filing of this instant suit.

"Q So that I take it you are saying that nothing relating to Centrex came to your attention other than the name during all the time that you have been with AT&T?

"A That is correct.

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"Q You didn't talk to anyone and nobody talked to you about the development of the tariffs for Centrex service?

"A Nobody did.

"Q Did the subject of Centrex service ever come before the executive policy committee, to your recollection?

"A No, it didn't. To my recollection, it has not.

"Q Do you know whether excise tax matters, to your knowledge, have come to the attention of the executive policy committee?

"A I do not recall any instance in which the excise tax matter has come before the executive policy committee.

"Q And I take it the subject of the Centrex never came up in any of the other committees while you were present?

"A No, it did not.

"Q Did it come up in any board of directors meetings of the two companies, Southern New England and Chesapeake & Potomac?

"A No, it did not.

"Q I take it you never discussed it with Mr. deButts?

"A I have not."

MR. NICKERSON: That is the chairman of the board, your Honor.

"Q Did you hear him discuss it?

"A I have not.

"Q Do you know whether the Centrex matters were discussed at the presidents conferences?

"A I can only recall one occasion on which Centrex figured in a presidents conference and I cannot identify the time period except to say that it was some time ago in which one of the presidents or the president of Pacific Northwest Bell reported on what I believe were the initial uses of Centrex CO, central office.

"Q Do you recall the date of that, approximately?

"A I will say approximately four years ago.

"Q How about other conferences other than the presidents conference that you have testified to, did the subject of Centrex come up?

"A I can't testify as to whether it did or not.

"Q To your knowledge.

"A Not during my attendance.

"Q Do you know how the decision to unbundle the Centrex rates was made in 1970 or 1971, whenever it was?

"A I do not. I am familiar only and have only been familiar since yesterday with the letter to the associated companies making this recommendation."

That concludes my reading from Mr. von Auw's deposition, your Honor.

Now, your Honor, if I may, I am going to move to the subject of the PBX and Centrex service and first refer your Honor to the fact stipulation, paragraphs 16 through 33. I think between Mr. Struve and myself we have given you the substance of what was in there. It tells you in substance the nature of PBX service and the nature of Centrex service, it discusses Centrex CO and CU.

I would like to call your attention at this point, your Honor, for specific mention, only two paragraphs. One is paragraph 28, which names the thirteen companies that provided PBX servic with direct in dialing and recites that direct in dialing was first offered by a Bell System company as early as 1959, and I would also like to draw your attentic to the next paragraph, paragraph 29, which recites the names of the six companies which also offered identified outward dialing, and again, that identified outward dialing is recited as being first offered by Bell Company as early as 1959.

So that now, your Honor, I would like to offer Exhibits 8A, B and C as a group.

Exhibit 8A, your Honor, is a letter of Mr. H.L. Kertz, the assistant president of AT&T, dated April 28, 1961, and it was sent on the page stamped 09500 to all general commercial managers of the operating companies, including copies for the marketing people, chief engineers and general traffic managers.

THE COURT: I don't see 09500.

MR. NICKERSON: It is in the upper righthand corner, your Honor, of the third page of the letter.

THE COURT: All right.

MR. NICKERSON: Exhibit 8B.

B are the notes that are referred to and attached, and Exhibit 8C is the rate development binder, which is entitled "Centrex Service Rate Development Considerations."

Your Honor, these are the central documents that AT&T sent in April to each of the operating companies.

Well, I will offer them first, your Honor.

MR. STRUVE: Your Honor, we have no objection whatever to the fact that AT&T sent these to each of the operating companies. Our understanding is that they are not being offered for the truth of the Centrex revenue requirements assumed therein, because we do not know if those requirements conformed to the actual revenue requirements that the companies determined those by their own individual studies.

MR. NICKERSON: Your Honor, I offer all of the documents for all purposes.

THE COURT: It may be received.

(Plaintiffs' Exhibits 8A, 8B and 8C were received in evidence.)

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MR. NICKERSON: Your Honor, these documents, the letter and the notes, are the ones which describe the Centrex service, which AT&T suggested to the operating companies be adopted.

As I say, they are central to a lot of the points that we are going to make, and a lot of it you have already heard from Mr. Struve and myself.

Let me draw your attention to just a few --

(Continued on the next page.)

MR. STRUVE: Before you go on, Mr. Nickerson, your Honor, we have not objected to the relevance of these documents. These documents are important in understanding the facts of this case. But I respectfully submit that it is not proper, once a document has been offered to your Honor and there has been no objection as to relevance, for Mr. Nickerson to give testimony about what the document contains, which we would then have to counter by pointing out what has been omitted.

THE COURT: The documents speak for themselves, do they not, and if Mr. Nickerson wants to make a comment, I don't know what objection there is. If he is incorrect in his comment, why, you correct him. I don't know really why you are taking the position you are. It would be helpful if he made a summary statement of what it was. And if there is anything in his statement that you think goes counter to the exhibit, you may make your own statement. And the end result, if there is a conflict, I will be guided by the document itself.

MR. NICKERSON: Your Honor, what 8A shows is that AT&T worked with a task committee to develop the basic principles and procedures which they deemed it feasible for the operating companies to follow in establishing the Centrex rate treatment, and they recite

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several fundamentals which Mr. Kertz says, "It is generally agreed are of" -- this is on page 09498 -- "utmost importance in establishing the rate basis for the large-scale development of this service."

THE COURT: Where do you see that, what page?

MR. NICKERSON: That is near the bottom of the page stamped 09498, the first page, your Honor.

THE COURT: I see.

MR. NICKERSON: The first fundamental is the maximum utilization of the investments in the dial PBX equipment. That, as your Honor will see, is so-called step-by-step equipment. Turning the page, it recites that the Bell System has upwards of $600 million invested in that equipment.

The second fundamental is that the rate treatment should be designed to keep the control of the choice of serving method, and that refers to Centrex-CO or -CU, in the hands of the telephone companies to the maximum extent possible.

The third fundamental is that a single Centrex offer should be visualized, treated essentially the same for rate purposes, regardless of the type of facilities used or their location -- in other words, whether Centrex-CO or -CU.

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I would like to call your attention to the paragraph, full paragraph second from the end of page 09499, which reads, in the first sentence:

"Uniformity of rate approach among the companies would seem to be of unusual importance in the Centrex offering, since it promises quickly to become a 'standard' service for our larger customers who have branch organizations scattered across the country."

Turning to the notes attached to it, namely Exhibit 8B, your Honor, I would draw your --

MR. STRUVE: Mr. Nickerson, excuse me. If you are finished with Exhibit 8A, I think it is important, going back to page 09499, with respect to the recommendation that the operating company retain a choice as to whether a given customer will be served by Centrex-CU or Centrex-CO, I would like to read the first two sentences of the full paragraph underneath the numbered paragraphs:

"The rate approach proposed assumes that these objectives will be attained. On this basis it is possible to contemplate somewhat lower rate levels than could otherwise be safely established."

And the other exhibits, 8B and 8C, make it clear that what Mr. Kertz meant by that is that if the telephone company does not retain the power to be sure that the most economical of the two serving arrangements is used to serve each customer, then the average revenue requirements for Centrex service will be driven up and the rate levels will thereby be driven up as well.

MR. NICKERSON: I think, your Honor, we must read the sentence which follows those which Mr. Struve read, which reads:

"Such lower levels can be expected to permit greater development of the service."

Your Honor, as you will see, I dispute the last statement of Mr. Struve, but I will take that up later.

Referring to the notes, your Honor, and starting at the bottom of page stamped 09501, there is a reference -- I will read it, your Honor. It says:

"The basic Centrex service offering, as now visualized, contains the following features, whether furnished on a 'CU' or 'CO' basis."

And then at the top of the page stamped 09502, it sets forth what that basic Centrex service is to consist of.

I think, your Honor, that I would now like you to look at a paragraph on page 09504, which is right near

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the bottom of that page and which refers to the example of the proposed rate treatment just above it and recites that that schedule reflects certain principles basic to the method proposed, and the paragraph I would like your Honor to see is the one I will now read, which reads:

"A single composite rate, regardless of serving method (Centrex-CU or Centrex-CO) with only a slightly higher charge for Centrex-CO to reflect the value of floor space and power provided by the company."

Finally, your Honor, in this exhibit may I refer you to the page stamped 09506, to the paragraph about in the middle of that page, which in its last sentence recites that the tariff "would desirably condition the offering upon the availability of facilities and specifically reserve to the company the right to determine where each type of Centrex service (CU or CO) will be offered."

The next paragraph, your Honor, refers to tariffs previously filed for an in-dialing service, and it says that it would seem desirable to obsolete those tariffs.

Your Honor, Exhibit 8C is, as I say, the rate binder, and it goes into greater detail with respect to the matters which are discussed in the notes and in Mr.

Kertz's letter.

I think what I would like to draw your attention to, although I consider the whole document important, your Honor, but I would like to draw your attention to some things which have not been specifically discussed in 8C and 8D, specifically starting on page 09649, in the paragraph just above or about the middle of the page, starting with the words "The station identification feature contributes its own particular share of problems and variety." And I think the next sentence is important, your Honor, if I might read it. "Automatic number identification (the most desirable form from a customer standpoint) is currently feasible economically only where PBX service features are furnished through centralized #5 X-bar equipment set up to function on a central office basis (i.e., extensions terminated basically as individual line services are terminated).

"In most situations the less desirable CAMA" -- CAMA refers to centralized automatic message accounting, CAMA -- "the less desirable CAMA method must be offered pending development of some economical means for furnishing ANI" -- that means automatic number identification -- "through SxS-type PBX facilities." That means step by step, your Honor. "This urgently-needed development is

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being investigated by the laboratories but it is doubtful if it can be made widely available much before 1964-1965, as matters now stand."

We will show your Honor that years later, in 1968, they did not furnish automatic number identification with all of the Centrex-CO, more than seven years later.

Now, your Honor, I would like to refer you, if I may, to the page stamped 09652, the paragraph that is numbered 3, which is under the heading of "Broad Rate Objectives." You see those words on the previous page.

THE COURT: On page 09652?

MR. NICKERSON: Yes. And if you will turn back the one page to 09651, your Honor, you will see a heading "Broad Rate Objectives," and then if you go over to the next page, the one numbered 3, you will see that one of those objectives is: "Make some improvement in earnings on basic PBX facilities." And then it describes that they have fallen behind.

Your Honor, I would like to refer you to the page 09694, and that is the Weighted Revenue Requirement example that AT&T gave, and what it shows is the difference in cost between Centrex-CO and -CU.

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THE COURT: What does the M.S. stand for on the line "Rate Schedule"?

MR. NICKERSON: Main Stations, your Honor. And we will come to this later, your Honor, that there is a difference between the cost of rendering Centrex-CO and Centrex-CU, and what they did was average it and charge a composite rate, as your Honor has already heard.

Although I consider all of that --

THE COURT: What is the Main Station? Is that the station from which a person makes a call?

MR. NICKERSON: Yes, your Honor, basically.

Mr. Heller reminds me to tell you that in that rate schedule that you are looking at, that that includes the cost of automatic number identification, ANI, even though it was not then furnished and was not proposed to be furnished with CU until a much later date.

MR. STRUVE: Your Honor, on the figures which are shown on 09694, two things should be borne in mind. First, that these revenue requirement figures were not figures which had been determined by studies to be actual figures for any Bell System company. They were illustrative figures which had been assumed so that some recommendations could be made about how to deal with such revenue requirements.

Second, your Honor will notice, if you take the line "Rate Schedule I," and look at Centrex-CU 300 Main Stations, the monthly revenue requirement was assumed to be $8.85, while the corresponding revenue requirement for Centrex-CO was assumed to be $9.49. So we are talking about a difference of less than 10 percent, which is substantially less than you find in many telephone engineering applications.

MR. NICKERSON: I think your Honor will find that when the costs of ANI are taken out of that, that it is in excess of 15 percent.

MR. STRUVE: There are two other pages of Exhibit 8C to which I would like to refer your Honor, because of a question Mr. Nickerson raised about Exhibit 8A.

On page 09651, the first sentence on the page: "By adopting this approach - i.e., having basically a single composite offering and retaining freedom generally to determine the serving method - we can justify a lower rate for this offering."

I would like to turn also to page 09677, and to read on the same point paragraph 10:

"It is particularly important that filed tariffs covering the Centrex service offering be worded so that the company reserves the sole right to determine the

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central offices in which Centrex-CO service will be furnished.

"This is considered necessary to protect the company in those cases where Centrex-CO service could not be economically justified, thus protecting the general body of rate payers.

"The customer always has alternative of Centrex-CU service.

"The apparent discrimination can be legally supported."

I should add that the fact stipulation makes it clear that on this point, as on other points, not all of the companies followed this recommendation.

MR. NICKERSON: Your Honor let me draw your attention to just one other thing --

THE COURT: I want to ask Mr. Struve with respect to his last statement: You say they did not follow the recommendation?

MR. STRUVE: That is correct. Some of the companies did not reserve in their tariffs the right to determine whether CU or CO would be offered.

THE COURT: All right.

MR. NICKERSON: As a matter of fact, your Honor, though, they did have practical control of that, because

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what they did was to reserve the right to offer it only when they said there were facilities available, and that meant available in economically favorable terms to the Bell System.

So that as a practical matter I think all but about one kept control of whether they would offer CO or not.

Your Honor, may I draw your attention to one other -- though again I consider this entire document important -- but I would like to highlight one point on page stamped 09653, No. 8 of "Broad Rate Objectives," which reads in the first two sentences:

"Do as much rate 'packaging' as possible.

"Promotionally, there are important reasons for packaging all of the basic features into a single rate - and one that would look about the same whether Centrex-CU or Centrex-CO is furnished."

MR. STRUVE: On this point of packaging, your Honor, I believe your Honor should also look at Exhibit 8B, page 09502. Those are the rate notes. They may be stapled to Exhibit 8A in your copy.

THE COURT: I have it. I take it at a given time, if these items have significance, you will call them to my attention. Finish what you have there and then we will take our luncheon recess.

MR. STRUVE: I wanted to call to your attention, your Honor, because Mr. Nickerson for the first time called to your attention the question of packaging the Centrex station charge, that on page 09502, the last indented paragraph:

"'Package' rates are easily understood by customers and simplify rate administration. Furthermore, it is sound to develop a package station rate, since the customer's overall communication requirements are initially reflected in stations. Also, in the case of Centrex-CO, there is no alternative: trunks, selectors, connectors, power and other dial PBX items charged for separately in the past do not exist as identifiable items dedicated to a single customer's use."

The point made in the last sentence may need a sentence of explanation. In the case of PBX systems you can identify the individual items of switching equipment which are being dedicated to a customer, because they are installed in his premises. In the case of a Centrex-CO system --

THE COURT: That is in your premises, the companies --

MR. STRUVE: They are facilities in the central office used in common with all other customers whose lines are served by the same central office, so that except by the most tenuous engineering allocation you could not determine who was using what items of equipment, and it changes from moment to moment.

THE COURT: On that note of explanation, we will take our luncheon recess and resume at 2 o'clock.

(Luncheon recess)

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AFTERNOON SESSION
2:00 p.m.

THE COURT: Proceed, please.

MR. NICKERSON: Thank you, your Honor.

I would now like to offer Exhibit 9 and Exhibit 11, which was attached to it. This is from the director of engineering economics, to the chief engineers of the operating companies, and it encloses the booklet, which is Exhibit 11, entitled "Centrex Development of Monthly Revenue Requirements."

Your Honor, all I think I need refer you to at the present time in that document are the five pages marked 09532 through 09535, and that simply summarizes some of the material contained in the other documents, in 8A, B and C, but for the benefit of the engineers.

MR. STRUVE: Your Honor, as with Exhibits 8A, 8B and 8C, we have had no objection, upon the understanding that we are not in a position to vouch for the accuracy of these figures as applied to any given operating company. We don't know whether a study subsequently done by operating companies came up with the same costs or not.

MR. NICKERSON: I think that would not

go to the admissibility.

THE COURT: All right.

(Plaintiffs' Exhibits 9 and 11 were received in evidence)

MR. NICKERSON: Now, your Honor, I offer Exhibit 8D, which is from the assistant vice president Landry, to the general commercial managers of the operating companies, and to a marketing department mailing list, and that simply summarizes again the material this time for the marketing people of the operating companies.

MR. STRUVE: Your Honor, again, as with Exhibit 8A through 8C and 9 and 11, we have no objection, but again we are not in a position to vouch for the extent to which the general data in Exhibit 8A would apply to a given operating company.

(Plaintiffs' Exhibit 8D received in evidence.)

MR. NICKERSON: Your Honor, I offer in evidence Exhibit 10.

MR. NICKERSON: This is of some importance, your Honor, and as you will see from paragraph 10 of the stipulation as to documents, it was a letter sent on or about April 28 to the operating and marketing vice presidents of each of the defendant operating companies, enclosing copies of the previous letter, 8A, that you have seen, and 8B.

I think this is important. May I read it to you?

THE COURT: Yes.

(Mr. Nickerson read from Plaintiffs' Exhibit 10 in evidence)

MR. STRUVE: Your Honor, as to this document, plaintiffs' pretrial memorandum indicates that plaintiffs offer the document for the purpose of showing that there was an agreement at the February 1961 operating vice presidents conference that all of the operating companies would follow the Centrex rate structure recommended by AT&T.

To the extent it is offered for that purpose, we object to it as hearsay. Mr. Kertz's testimony was that there was an introductory presentation by his people on what Centrex was going to be.

THE COURT: I don't have that testimony yet, do I?

MR. STRUVE: No. I am simply offering that as an explanation for our hearsay objection. And then the plaintiffs carefully avoided asking Mr. Kertz in his deposition whether there was in fact any agreement or any acceptance of the principles that had been briefly outlined. In fact there was not.

THE COURT: It may be received.

MR. NICKERSON: Your Honor, I now offer Exhibit 12, which, as you see from the stipulation as to documents, was sent on or about May 3, 1961, by F. C. Smith, who is titled "Rate Administrator," to the general commercial manager of one of the operating companies, informing him of a two-day meeting for the employees of the defendant operating companies in New York on May 17 and May 18. And the stipulation recites: "Other copies of this letter were sent to each of the other defendant operating companies." And it calls that meeting that is referred to in the letter.

I would like to draw your attention, your Honor, to the second sentence of the second full paragraph, which reads: "Our thought would be to have one representative from each company, desirably the division level rate man who will be directly responsible for the development of the Centrex rates."

MR. STRUVE: No objection.

(Plaintiffs' Exhibit 12 was received in

xxx evidence)

MR. NICKERSON: Your Honor, I now offer Exhibit 14, which consists of 40 charts, which it is stipulated in the stipulation as to documents, paragraph 14, was furnished by AT&T to some or all of the defendant operating company employees attending the May 17 and 18, 1961 meeting.

This, your Honor, is a very good summary of Centrex service, and it summarizes in chart form a lot of what was in Exhibits 8B and C.

For example, on the third chart, the page stamped 12576, it shows what the basic Centrex service offering furnishes. On the front page, stamped 12574, it refers to systemwide uniformity of rate approach, package rates, a single composite service offering, etc.

I won't go all through it, your Honor. I would just like to draw your attention to one of the charts, and that is No. 12, which is the page stamped 12585, and that is the one that is headed "Centrex rates should include allowance for future PBX automatic number identification costs," and that refers to the Centrex-CU.

And if you will see, under "Considerations," the sixth one down, that sixth consideration reads:

"Would be difficult to increase rates when ANI" -- automatic number identification -- "added to existing Centrex installations."

And the following one: "If cost included in Centrex rate now, it seems company would have obligation to furnish ANI within reasonable period after availability."

And the conclusions. The first one: "Include allowance for anticipated PBX ANI costs when Centrex rates are initially established."

And the second conclusion: "Accept obligation to install PBX ANI equipment as soon as practicable, consistent with orderly programming."

As you will see later in the case, your Honor, ANI was not furnished with CU in all cases, even up to 1968, some seven years later.

One other chart I would like to refer your attention to and that is No. 39, and it is stamped 12612. It is the next to the last page, your Honor.

THE COURT: I have it.

MR. NICKERSON: The heading is "Are suggested Centrex rates salable?" And there they say that 24 per cent of the company's PBX customers that have been studied could buy Centrex and save money; the balance of them, namely 76, would have to, as they call it, buy up.

Notice the footnote, your Honor, there, which reads, "Overall communications bill including PBX attendant costs." In other words, a part of the saving to the customer with direct distance dialing is that he won't need as many attendants to make the connections. So that chart is to be interpreted that, even with those savings, 76 per cent of the customers would buy up to get Centrex.

All of these are important, your Honor, and they are an excellent summary of the previous material.

I think that is all I would call your attention to specifically on that exhibit at this time.

MR. STRUVE: Your Honor, on the admissibility of Exhibit 14, our position is the same as on the other similar exhibits, that is, that we can't vouch for the extent to which the generalizations were followed by or held for any given operating company.

I would like to mention that the reasons for having a package rate for Centrex services are stated at page 12575.

THE COURT: Will you explain to me in your own language what is the meaning of the reference to a packagedrate composed of a station rate providing basic facilities, equipment and an attendant's position rate. What is the reference to attendant's position rate? Either one of you answer. You both seem so knowledgeable about this thing.

MR. NICKERSON: I think probably Mr. Struve knows a lot more about the telephone business than I do, but I think that --

THE COURT: You are doing fairly well at that.

MR. NICKERSON: I think I know the answer to that question. An attendant is someone like what you would call your switchboard operator.

THE COURT: That is your switchboard operator?

MR. NICKERSON: Yes. That is the position he has at the board or whatever, the piece of equipment that that person has to operate.

Am I right?

MR. STRUVE: That is precisely right.

THE COURT: At least you have some agreement on something.

MR. NICKERSON: Now, your Honor, I would --

MR. STRUVE: Excuse me, Mr. Nickerson.

THE COURT: I don't think Mr. Struve is finished.

MR. NICKERSON: Oh, excuse me, your Honor.

MR. STRUVE: In view of the emphasis that Mr. Nickerson placed upon the question of automatic number identification, I think it should be pointed out that until automatic number identification became available, the telephone company obviously had the expense of providing number identification through operators, which generally is even more expensive than automatic number identification, and indeed that is the reason why direct distance dialing was introduced in the 1940's and 1950's, because it is cheaper in the long run to do it automatically than it is to do it using operators.

MR. NICKERSON: Your Honor, I am afraid I have to dispute that statement, the last part of it. I will show you later in the documents that the cost of ANI was more expensive, as they put it in here, than was the so-called CAMA operator, which was referred to as the alternative way of doing it, where you gave your number to the operator. And they figured out those costs, and they figured that the costsfor ANI were more expensive than for the CAMA operator. I will get to that later.

Now, your Honor, I offer Exhibit 17. This is a document which it is stipulated under paragraph 17 of the stipulation of documents that an employee of the Chesapeake & Potomac Company of Maryland, who attended the May 17 and May 18, 1961 meeting, prepared or caused to be prepared. And you will see a reference, your Honor, throughout this to charts. And if you compare those with the charts, Exhibit 14, you will see what the notes refer to.

Let me draw your attention, your Honor, to the things that I think are important, and these notes are important because it shows what was discussed at the May 17 and May 18 meeting.

You will see on the first page, the one stamped 19298, the heading "F. Smith, salmon binder." F. Smith is a reference to the person who sent the invitation to the meeting. That is Exhibit 12. He was the rate administrator and the salmon binder is the one that your Honor has already seen of 8C.

What I would like to show you in that heading is about in the middle of the page, the line that reads as follows: "'So important' for all companies to go down same road."

THE COURT: Where is that?

MR. NICKERSON: It is about in the middle of the page, your Honor.

THE COURT: I see it. Is that the one "Why costs method used? Very important for effective rates to make rates tie in with"? Is that what you are referring to?

MR. NICKERSON: No, just above that, your Honor, about five lines above that. "'So important' for all companies to go down same road."

THE COURT: I see it. How about the reference, up above, "Emphasize - binder - 'to illustrate method but not to set rate levels.'"?

MR. NICKERSON: Oh, absolutely, your Honor.

THE COURT: What is the significance of that?

MR. NICKERSON: The significance of it, your Honor, is that each company may have different costs in its own area, and since rates are in large part set by cost, each company has to determine by its own revenue requirements the actual level of its rates.

But if you recall in the 8A, B and C there was a reference to the importance of maintaining uniformity of rate structure, and one of the reasons for so doing was so that the rates didn't get too far apart.

We do not contend, your Honor, that they all agreed to file identical rates. Indeed, the instructions were that that had to be determined on the basis of the company's own studies. What AT&T insisted on was uniformity of rate approach, and in particular the package approach.

Aga.. you will see just above the middle of the page, on the page stamped 19299, small "f" -- do you see that, your Honor? A little above the middle of the page? "Systemwide uniformity of rate a (Purpose of meeting) If do so - various co .es' rates will be close to each other."

Now, your Honor, if I might just refer you to a sentence on page 19300, about a quarter of the way down, I would like to refer you to the sentence which reads "Could not live with all customers having a choice." That refers to a choice of Centrex-CO and Centrex-CU.

Now, your Honor, if I might refer you, on page 19301, to the entry which is marked "Chart 12," and that has to be read in conjunction with Chart 12 of Exhibit 14, which is page 12585, and again it refers to "Allowance for ANI," meaning automatic number identification. That entry is important, particularly the part of it that reads, "If do not include costs now - difficult to sell later. ANI vs. non-ANI - value identical?

"Ans. - If costs not included - customer will be selective.

"CO" -- meaning Centrex-CO -- "= ANI - so charge higher differential? No - Both get same service - one by operator and one automatic."

Finally, your Honor, on this exhibit I would like to refer you to the next to the last page, 19305, to the material under Chart 35, which again refers to the chart of Exhibit 14, and particularly to that portion of it which states, "Legally - cannot enforce 100% company option - Go as far as legal people feel we can - as to company choice.

"Each case - at least initially - decide before offering to customer - whether to be on CO or CU basis."

And then on the same page, your Honor, the last three lines, "We want to sell - System very anxious to push!"

Finally, your Honor, on the final page of that exhibit, page stamped 19306, under the heading "F. Smith," you will see an item marked No. 1 recites, "Adopt systemwide uniform rate structure approach - most important."

The fourth one I draw your attention to, under Mr. Smith's name, "Do not let present commitments control rate structure or rates - A very small part of the ultimate."

And the significant item, at the bottom of the page, "Review plans and rates with AT&T people, before filing."

Now, your Honor, I now offer --

THE COURT: Before you go ahead, Mr. Struve wants to say something.

MR. NICKERSON: Excuse me.

MR. STRUVE: We object to Exhibit 17, your Honor, both on the grounds of hearsay and on the grounds of lack of identification. In explanation of our hearsay objection, let me explain that this is one of three documents which plaintiffs intend to introduce as notes of things said by AT&T personnel at the May 1961 meeting. None of the statements which Mr. Nickerson has read to you appear in either of the other two sets of notes. In our view the use of what may or may not be contemporaneous notes, and what may or may not consist only of notes, which in one case obviously consists also of notes to the writer himself, is productive of highly unreliable evidence. And since your Honor already has before you the written advice that AT&T gave to the operating companies, we submit that these are clearly hearsay.

I should add that the remarks to the extent that they are identified appear to be attributed to Mr. Frederick Smith, who at that time was the rate administrator in the rate department of AT&T and is now retired. Plaintiffs took Mr. Smith's deposition but they did not choose to ask him questions as to any of the things that are attributed to him in this document.

For all those reasons we submit that the document is hearsay.

MR. NICKERSON: I don't think we had this document at the time we examined him. In any event, he couldn't remember --

THE COURT: Isn't there substance to Mr. Struve's position here? These are the comments and observations, as I understand it, of somebody who is a participant at the meetings on May -- is it 15, or whatever the date is.

MR. NICKERSON: May 17 and 18.

THE COURT: 17 and 18. Why are these observations admissible evidence against the defendants here?

MR. NICKERSON: In the first place, it is an admission, your honor --

THE COURT: By whom?

MR. NICKERSON: By the person who prepared it, by the person who prepared the document.

THE COURT: The person who prepared it is not a defendant in this case.

MR. NICKERSON: Yes, your Honor, he is a defendant.

THE COURT: Mr. Smith is a defendant?

MR. NICKERSON: No, but the person who prepared this document was an employee of Chesapeake & Potomac Company of Maryland, and he took the notes and he prepared or caused to be prepared the document.

THE COURT: You know, I am receiving a great many documents, as I explained to you previously, where there is a relevant question as to admissibility and even relevancy, on the theory I am sitting in a non-jury case. But here you have a man's impressions, what he recorded at the time, expressing his own opinion or what he believed he heard. How do you make this binding on the corporate defendants here?

MR. NICKERSON: Your Honor, in the first place, as I understand it --

THE COURT: You have the basic documents in evidence that were the subject of discussion at that time.

MR. NICKERSON: I do, your Honor.

THE COURT: I will take it just because I do follow this policy in a non-jury case, and I must say to you now that this is certainly of questionable value in any event. You might have a half a dozen men sitting at the same meeting and each recording a different reaction to what was being said at the time.

MR. NICKERSON: Certainly.

THE COURT: We will let it go at that.

MR. NICKERSON: Certainly, your Honor, and under Rule 801(d) it is a statement by an agent or servant, and it is stipulated that it concerns a matter within the scope of his agency or employment, and that it was made during the existence of the relationship.

THE COURT: The defendants stipulated to that in this case?

MR. NICKERSON: The defendants stipulated to that.

THE COURT: Where is that stipulation with respect to this exhibit?

MR. NICKERSON: That stipulation is in the stipulation as to documents, your Honor, paragraph 269(b).

THE COURT: Which paragraph?

MR. NICKERSON: Paragraph 269(b).

Take 2p.m. mplt 1

(Pause.)

THE COURT: I must say I don't understand the first thing here. "Except for the documents described in these paragraphs -- was directed to or concerned with matters within the scope of employment of the officer who prepared or sent the document."

MR. NICKERSON: Those track the words of Rule 801(d)(2)(d).

THE COURT: You say "Except for the documents described in paragraphs" -- what was directed?

MR. NICKERSON: You will see in paragraph 269. Each of the documents marked as exhibits and stipulated to have been prepared, sent or received by an officer or employ of the defendant, unless otherwise stated, was directed -- so that we have a stipulation here in the stipulation as to documents that this was prepared or was caused to be prepared by an employee of the Chesapeake & Potomac of Maryland.

THE COURT: What exhibit number was that last one?

MR. NICKERSON: 17, your Honor.

"That it was directed to or concerned within the scope of employment" --

THE COURT: Where do you have the "scope of

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employment"?

MR. NICKERSON: It is right on top of page 48 of the stipulation of documents. That paragraph --

THE COURT: Maybe you both understood what you signed. I must say in all candor that I don't understand it. There is something missing out of that.

MR. NICKERSON: No, your Honor.

THE COURT: What is the subject there?

MR. NICKERSON: The subject is "each of the documents."

THE COURT: Well, let's not argue about that. I have told you the basis on which I will receive it.

MR. NICKERSON: May I for the record, your Honor, also indicate that we think that it is admissible against AT&T under Rule 801(d)(2)(c) and of course also admissible under the co-conspirator rule.

Now, your Honor, I offer another set of notes from the same meeting, Exhibit 16.

THE COURT: Now, who wrote those notes?

MR. NICKERSON: As you will see from the stipulation of documents, an employee of Southern New England Telephone who attended the May 17th and 18th meeting prepared or caused to be prepared Exhibit 16.

Again, it refers to the charts, which are

Exhibit 14. Your Honor, I think all I need do on this at this time is refer you to the first sentence: "All companies should key to Centrex rate pattern as developed by task force. And, your Honor, under paragraph 269 of the stipulation as to documents, it is stipulated that that document was directed to or concerned matters within the scope of employment of the employee who prepared it."

And so we say clearly it is admissible.

THE COURT: Mr. Struve, is that the stipulation?

MR. STRUVE: It is our stipulation, your Honor, but our position is that it is as much hearsay as Exhibit 16. None of the witnesses were asked about statements in this document. As you will notice, your Honor, none of the statements that Mr. Nickerson read from Exhibit 17 appear in Exhibit 16.

The mere fact that the documents concerned matters within the scope of the employment of persons who attended the meeting does not mean that the document sets forth or was intended to set forth what was discussed at the meeting.

Your Honor will notice several matters in the document which are peculiar to Southern New England -- if I may speculate for a minute, I think it is perfectly clear that no AT&T employee was discussing such peculiar matters there.

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Even if the document were an admission, which we contend it is not, it would only be admissible against the Southern New England Company. What plaintiff is trying to establish is that someone from AT&T said the words contained in the document, and I don't think he has established that.

MR. NICKERSON: Your Honor, any statement made by a defendant or an employee of a defendant within the scope of his employment is admissible against that defendant

We submit it is admissible on two grounds:

One, the co-conspirator rule, 801(d)(2)(e), and it is also admissible, we submit, under 801(d)(2)(c) as a statement by a person authorized to make notes of the subject.

AT&T called this meeting and said these things --

THE COURT: Well, I will come back to what I said before. They are simply notes made by persons in attendance at the meeting, and two people listening to the same discussion might have two impressions of what was said and discussed.

I don't see how that is binding, but I will take it under my general rule.

MR. NICKERSON: Your Honor, one thing that they are clear and uniform on is uniformity of rate structure was discussed.

THE COURT: Well, you have that all along. You have that in your basic documents.

I do not understand why you have to get into this controversy with the other side. You have that in the basic document which you offered in evidence. It seems to me instead of strengthening your case you may be dissipating it by these various reports.

Now, if Mr. Struve has a statement from somebody else that is contrary to this, on your theory it ought to be received.

MR. NICKERSON: Possibly, your Honor, yes.

I think consistently I would have to say that.

THE COURT: It seems to me that the documents you offered previously speaks for itself as to what the policy was.

MR. NICKERSON: Yes, it does, your Honor, and the purpose of these notes is to show that that was re-emphasize at a later meeting that they called.

I will now offer Exhibit 15, which are notes of the same character, and there are only, I guess, three things that I would refer your attention to.

Again, you have to look at the charts, your Honor --

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THE COURT: Where is the chart?

MR. NICKERSON: Exhibit 14.

Instead of chart, they say "page."

You will see on Exhibit 14, the sixth item down is "Uniformity of System-Wide Approach."

And on the next page, it says "Very important -- economically for the future."

THE COURT: I don't understand. What do you really add to your case by putting in the reaction of the participants to the conference? I don't know how many sat in on that conference. It would make just as much sense to obtain the notes of every person who sat in and offer them in evidence.

MR. NICKERSON: If they were inconsistent, your Honor, I wouldn't do it. But what is important, for exmple, from the one thing I read, is that it was important economically for the future of the Bell System that they have system-wide uniformity of rate structure.

THE COURT: You have it here on the first page.

MR. NICKERSON: Yes, and the only thing that it adds that it was important economically. That is the only thing it adds to it.

THE COURT: Mr. Struve, do you want your say?

MR. STRUVE: I certainly want to object on the

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grounds of hearsay. The statement, if it is meant to be a statement of Mr. Smith, "very important economically for the future" -- I don't know what that means. He was not asked about that on his deposition.

Once again we say the document lacks probative value and is hearsay.

THE COURT: If it lacks probative value, I won't consider it. I will receive practically everything that is offered, but when it comes to my final judgment, I will only consider exhibits that are relevant to the main issues, and hearsay, of course, will be excluded, except insofar as hearsay may be considered under the conspiracy charge, and that will involve the plaintiff introducing sufficient evidence to prove that there was a conspiracy and that the defendant became a member of the conspiracy.

MR. NICKERSON: Your Honor, may I also ask you to consider the admissibility against AT&T under Rule 801(d)(2)(c). I have a little memorandum, if I may hand it up to your Honor.

THE COURT: Well, I have received hundreds of pages of memorandums. Another little one won't hurt, I guess.

MR. NICKERSON: This memorandum refers not only to these notes, your Honor, but notes of the 1965 conference,

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which are even more important.

(Pause.)

THE COURT: What else do you have now?

MR. NICKERSON: Nothing more on those notes, your Honor.

I would like to move on.

THE COURT: Looking briefly at this, I see it cites Geaney, and I see it is 417. Why are we spending so much time on whether these matters are or are not admissible. Let's move on.

MR. NICKERSON: All right, your Honor.

I now offer Exhibit 19, which is a memorandum sent by the general marketing supervisor of one of the defendants' operating companies, namely, Chesapeake & Potomac to the assistant vice president for revenue requirements, and the only thing I refer to, your Honor, is the full paragraph on the second page, the one 19296.

If I may explain what that is about, it refers back to the suggestion at 8A, B and C, that there be followed into the rate for Centrex the deficiency in the current rates for PBX conventional equipment, and this gentleman, who is the marketing supervisor, says that this approach would appear to contain some aspects of discrimination.

That's all I wanted that for.

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THE COURT: That isn't his full statement.

MR. NICKERSON: No, it isn't, your Honor.

THE COURT: It states, "On the other hand" --

MR. NICKERSON: Yes.

THE COURT: Then you have to read the whole thing.

MR. NICKERSON: I should read it into the record, perhaps:

"On the other hand, if the transition is to be gradual and long drawn out, as I feel it would be, this approach would appear to contain some aspects of discrimination, while at the same time making the transition more difficult. At this writing I am inclined to feel we should not go too far on this aspect."

MR. STUVE: Your Honor, I object on relevance for two reasons.

There is no proof that these refer to the schedules which Chesapeake & Potomac later followed.

Secondly, there is no reason to believe that the statement was made referring to discrimination in legal sense. There is every reason to believe that he was talking about discrimination in the layman sense, and even if he was talking about discrimination in a legal sense, he was not the person in the company qualified to do so, and there is no proof that this statement refers to legal discrimination.

MR. NICKERSON: Your Honor, you can see what he was referring to "We have reviewed the pink book of Centrex service" -- which obviously refers to the AT&T pink book.

Of course, the rates weren't filed yet. What he was referring to is the rates that AT&T sent.

THE COURT: They may be received.

MR. NICKERSON: Now, your Honor, I would like to offer Exhibit 123, and what I would like to draw your attention to is the last full paragraph -- I should perhaps describe it for your Honor.

It is a document which was prepared by AT&T by a Mr. Marker, and he purports to be the Centrex rate history, and on the top of the second page, the one stamped 34921, he recites "Centrex could have been offered on a central office equipment-oriented basis" -- that is CO -- "and on a customer premises equipment-oriented basis" -- CU -- "at two significantly different levels of charge and with the customer having the option to order either. However, the judgment reached was to offer Centrex as one service with the choice of serving met being retained by the Telephone Company. This approach was aired against protecting early retirement of adequate and entirely usable step-by-step PBX installations and to provide the opportunity to serve the customers from the central office when that

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method best served the needs of the business."

This document was dated in 1969, so it is a retrospective look at the reasons why Centrex was offered in the form that it was, and also an indication that it could have been offered at two significantly different levels of charge.

MR. STRUVE: Your Honor, we have no objection to the admission of this document. We believe, that its true significance is apparent when you read the first paragraph on page 39420. That paragraph makes clear that the reason why the memorandum was written by AT&T staff people was to answer a question which had been raised as to why Centrex CO rates were lower than rates for individual business lines.

THE COURT: I think you should want this document in evidence, don't you?

MR. STRUVE: We do.

THE COURT: In fact, the very paragraph that Mr. Nickerson read offers an explanation that I would think is of some substance from your position, Mr. Struve.

Mr. Nickerson apparently doesn't agree with me on that, but, as I say, I think you would want that.

MR. NICKERSON: At any rate, I offer it, your Honor.

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THE COURT: Well, you are in agreement with me on this.

MR. NICKERSON: Yes.

Now, I would like to offer Exhibit 20, a booklet entitled "Centrex PBX Service," and in accordance with paragraph 20 of the stipulation as to documents, was prepared in July of 1961 by the General Commercial Department Engineering Section -- "Rate Unit of Mountain States Telephone Company."

All I will refer you on that, your Honor, is the last two lines of page stamped 21021 and the next four lines of the following page. That refers to the O&E Department of AT&T, and it says:

"The O&E Department realizes that their rate schedules" --

THE COURT: What is the O&E Department?

MR. NICKERSON: Operations and Engineering Department of AT&T.

"--realizes that their rate schedules as shown below cannot necessarily be applied to each company. They do, however, desire uniformity in the basic service offering," and then they go on to describe it.

MR. STRUVE: Your Honor, we object to this document on the ground of relevance for two reasons.

First of all, the statement merely repeats the statements in other exhibits, and your Honor can read them.

Secondly, there is no showing that this recommendation was adopted by the management of the Mountain States Company. In fact, the stipulated facts show they were not. The person who wrote this memorandum contemplated offering Centrex CO and CU, as AT&T had recommended.

In fact, there is no question about it, this is in the stipulation of facts, that when the initial Centrex tariffs were filed in the Mountain States Company, they did not offer CO at all, they offered CU; therefore, the views offered in this document are irrelevant to the views of the Mountain States Company.

THE COURT: Well, again, it will be received, and in this instance, too, I don't know why we are spending so much time on it. If you read the first page, "The purpose as to this memorandum to crystallize thinking on this subject and to bring together diverse views, to admit there is no black and white solution to this problem."

And then he adds, "It has been most difficult to get this offering off dead center."

Reading on, what are you so concerned about this for? Again, I am saying, the basic document that Mr. Nickerson relies on is in evidence. I suppose each individual from a

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company relating his own problems in relationship to AT&T --

MR. NICKERSON: I think it is relevant what they understood AT&T to be saying.

Your Honor, I will move on, then, to the filing of the rates, the Centrex rates and the basic material with respect to that is in the stipulation of facts, paragraph 34.

THE COURT: Just a minute, please.

What number?

MR. NICKERSON: Paragraph 34 of the stipulation as to facts. Attachment B, your Honor, referred to in that paragraph shows the filing and effective dates of the Centrex tariffs of the operating companies, and then the next paragraph, paragraph number 35, refers to Attachment C, which summarizes some of the things about the Centrex rates, namely, the features included -- and I will explain that to you later -- for minimum stations, etc., where there is a higher station rate for CO and CU, the restricted stations are charged at less than the unrestricted stations.

The initial contract period, where they are CO and CU, and where the company determines CO or CU, and the footnotes are important to that document, your Honor. They appear at pages 5 and 6 of the document, and I will explain those later. I don't think there is need to stop on them now.

The fact stipulation 36 -- I should perhaps read to you the first sentence of paragraph 35, which reads:

"The initial Centrex tariffs of the defendant operating companies all provide for the direct inward dialing, identified outward dialing and a single monthly Centrex station charge which covered both exchange access and intercommunication."

So that all of them had the basic package rate.

Paragraph 36, your Honor --

MR. STRUVE: Excuse me, your Honor, before you leave Attachment C, I believe I should point out to the Court that Attachment C provides a graphic demonstration of the extent to which the operating companies in fact followed the AT&T recommendations in question. There are indications that the operating companies were in accord with AT&T recommendations, where "yes" appears. Where "no" appears, that means they did not accept it. The recommended minimum number of unrestricted Centrex stations was 300. The actual numbers of minimum stations were from 100 to 500.

As for the initial contract period, the initial [illegible]T&T recommendation was for three years, and what the operating companies actually did ranged from five years down to zero.

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MR. NICKERSON: Your Honor, you will see that the basic Centrex service which is referred to in the documents, in particular on 8B on page 09502.

THE COURT: Where is Exhibit 8B?

All right.

MR. NICKERSON: You will see, your Honor, starting at the bottom of the page stamped 09501, the basis of the Centrex offering goes on to the next page, and it shows what that was, and you will see from this document that almost every one of the companies furnished that basic service and every one included the package rate.

THE COURT: Yes, but you haven't answered what Mr. Struve's comment was just now with respect to your Attachment C.

MR. NICKERSON: Well, there were differing circumstances, surely.

THE COURT: He is suggesting rather substantial differences among the many companies that are listed there.

MR. NICKERSON: No, your Honor.

THE COURT: You say they are not?

MR. NICKERSON: I say they are --

THE COURT: Well, you made a point of the differences between CO and CU, and if you go down the line here, there are more "no's" than "yeses" here. How do you explain that?

MR. NICKERSON: Because, as I explained to you earlier, almost all of those companies -- you will recall in the instructional material what AT&T said, or maybe it was in the notes. I have forgotten which now.

AT&T said that "We should go as far as we can legally in order to retain the choice."

Now, as a practical matter, your Honor, you will see that almost all of those companies that said whether you determine CU or CO, where it says "no," in fact, your Honor, the tariff provided that the offering of Centrex service was subject to the availability of facilities, and we will show later with the documents, your Honor, that almost every single one of the companies retained in its own hands the determination, and they exclude that availability of facilities to mean availability on an economically favorable basis to the phone company. So that as a practical matter almost every one of the companies retained the practical effect of keeping control of whether they would give CO or not, and we will show that in a document that comes in later.

With respect to the minimum of stations, your Honor, that was not central to it. Obviously you could have a smaller number of stations with a CO installation, as, for

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example, in New York.

For all practical purposes, your Honor, the package rate and the basic rate structure -- remember, that is what we are contending, your Honor -- there was uniformity of rate structure, not of every detail.

Some of those, for example, Mountain States, CO obviously wouldn't be economic in a rural area, because you would have long lines from each station running to a central office rather than trunks, so that it wouldn't make any sense to offer CO in Idaho or in Montana or New Mexico or Arizona.

THE COURT: Well, that certainly doesn't follow. In New York it was no.

MR. NICKERSON: New York offered both CO and CU.

THE COURT: I don't see that here.

MR. NICKERSON: Yes, your Honor, the next to the last column where it says both CO and CU.

We will have specific testimony, your Honor, with respect to New York, that even though it wasn't in the tariffs, that they held the choice in their own hands, that as a practical matter they did.

Mr. Appleyard testified to that on his deposition.

THE COURT: All right. Let's go ahead.

MR. STRUVE: Your Honor, if I may have one

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statement --

I would like the record to indicate that my silence doesn't indicate that I agree. As a matter of fact, the documents show that AT&T allowed the companies to do as they pleased.

THE COURT: All right, the record is clear that you do not acquiesce in his comment.

MR. NICKERSON: Now, your Honor, I would like to offer in evidence representative tariffs so that your Honor will have them before you.

This is for the period 1961 through 1972, from New York, Pennsylvania, Michigan and CNP.

Now, New York tariffs are Exhibit 271.

Pennsylvania is Exhibit 41B.

THE COURT: If these are only the first hours of the trial, we have already received so many exhibits, I think we will need a warehouse by the time we are through here

MR. NICKERSON: This is the only way I can prove my case.

THE COURT: Well, I have no doubt you are offering to prove your case. I still am making that statement.

Now, these are different tariff schedules, are they, filed with regulatory agencies?

MR. NICKERSON: Of those four states, your Honor.

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I wanted you to have a representative set of them.

THE COURT: Is there anything in particular that you want to point out? Take for example, 271, which is the tariff filed with the Public Service Commission in New York.

MR. NICKERSON: I don't think I need to point out anything specific. I think your Honor knows where we are going. I will want to refer to the tariffs later.

THE COURT: Well, I take it that these are being offered to show that the same tariffs were filed for both CO and CU?

MR. NICKERSON: It shows, your Honor, the whole gamut of the Centrex filing. It shows the package rate, it shows both inward dialing and identified outward dialing and Centrex CO and CU, that is, where it is on the telephone company premises and the premises of the customer.

(Pause.)

MR. STRUVE: Your Honor, we do not object to the receipt in evidence of Exhibits 41B, 41C, 41D and 271. I must object to Mr. Nickerson's testimony that these are representative of all the other jurisdictions, which occupy about two file drawers.

The facts in the stipulation, Attachment C, which your Honor has read, and Attachments D and E, which refer to the rates, show to what extent the companies are representative of one another.

THE COURT: Mr. Struve, you referred to Mr. Nickerson testifying. Mr. Nickerson was referring to what was in the exhibit.

I tell jurors in every jury trial, before a singl word of testimony is taken, that the statements of lawyers are not evidence, the only evidence are the testimony and exhibits that the Court receives.

I think this would be a good point to take our mid-afternoon recess.

(Recess.)

wcrl

MR. NICKERSON: May I proceed, your Honor?

THE COURT: Yes, please.

MR. NICKERSON: I would like to read from the deposition of Frank L. Fuller, and I will ask Mr. Heller to read the responses. Starting on page 3, line 17:

"Q Mr. Fuller, by whom are you employed?

"A American Telephone & Telegraph Company.

"Q And in what capacity?

"A General tax attorney.

"I attended the University of Virginia, both undergraduate and law school. I graduated from college in 1940 and from law school in 1948 after service in the Second World War.

"Q Would you give us your legal career thereafter giving us dates?

"A Thereafter I practiced in Baltimore, Maryland for eight years from 1948 through half of 1956 and in the middle of 1956 I came with the American Telephone & Telegraph Company.

"Q In what capacity?

"A As tax attorney. The word general was added to my title in 1972."

Skipping to line 24 of page 4:

"Q Now, what were your duties as tax attorney prior to the time that you became general tax attorney?

"A To give legal advice to the company on tax matters both federal as well as state and local.

"Q What were your duties when you became general tax attorney?

"A To do the same thing, but also largely supervise the work of other tax attorneys in my office, including Mr. Gomperts.

"Q How many attorneys are there in the general tax attorney's office?

"A Five in addition to me."

Skipping to page 6, line 3:

"Q Do you attend any AT&T committee or task force meetings or conferences?

"A Yes.

"Q What ones?

"A The legal department has an annual conference once a year that lasts for about four days. They sometimes have conferences at mid points in the year for a shorter period of time. There are also local legal conferences of just the attorneys at AT&T.

"Q The conferences that you spoke of that are held once a year, are those of the whole Bell System?

"A Yes."

Skipping to page 7, line 6:

"Q Now, what is the function of the office of the general tax attorney?

"A To give advice to the company on all tax matters: Federal, state and local.

"Q And that includes excise taxes?

"A Yes.

"Q Was that its function during the period 1961 through 1972?

"A Yes.

"Q Does the general tax attorney's office have any other functions other than giving advice?

"A I would interpret advice to include everything we do. Advice includes advice on the drafting of documents, what the language should be in documents, and things of that sort.

"Q Is that advice given to AT&T and the other members of the Bell System?

"A In some instances.

"Q In the period 1961 to 1972, did the general tax attorney's office draft proposed legislation?

"A On occasion, yes.

"Q Prepare position papers?

"A No position papers that I recall.

"Q During that period, did the office have any function with respect to the collection of excise taxes?

"A Only indirectly in the sense that we were called upon to give advice as to when a particular payment was subject to the tax."

Skipping down to line 23:

"Q And from time to time did the general tax attorney's office give advice with respect to the manner in which the taxes should be collected?

"A I am not sure what you mean by manner. We only gave advice when a particular service was a type of service payment for which would be subject to the tax, but not as to the manner in which it is put on a bill."

I should say, your Honor, that we are reading these with the corrections that were made by the witnesses.

THE COURT: I know that.

MR. NICKERSON: All right.

"Q Did the general tax attorney's office, during the period 1961 through 1972, draft any guidelines for the operating companies with respect to tax matters?

"A No.

"Q Was that done by any department in AT&T?

"A Yes.

"Q Which department was that?

"A The comptroller's department.

"Q To whom does the general tax attorney report?

"A The vice president and general counsel.

"Q Was that true in 1961 through 1972?

"A Yes.

"Q What was the relationship between the general tax attorney and the tax section of the comptroller's department?

"A They are one of the departments to whom we give advice in tax matters.

"Q Is there someone in the comptroller's department with whom you have a continuing communication relationship? Do you understand that question?

"A No, I really don't.

"Q I am not sure I do. Let me see if I can rephrase it.

"Do you deal with anyone on a regular basis in the comptroller's office?

"A Yes.

"Q Who is that, or what position does he hold?

"A The assistant comptroller, who is in charge of, among other things, tax matters.

"Q Do you happen to know who that was during the period 1961 through 1972, or what persons occupied that office during that period?

"A That office was occupied by a number of persons and I am not sure I can remember all of their names.

"Q Can you remember any of them? Is Snyder one?

"A Snyder is one.

"Q H. A. Snyder?

"A Yes. R. N. Flint would have been one.

"Q Do you remember any others?

"A Samuel Bonsack, Edmund Rast, John Ryan. I really can't remember any more.

"Q During the period 1961 through 1972, did the general tax attorney's office prepare any publications that were sent to the operating companies of the Bell System?

"A I don't understand the word publications.

"Q Well, did you prepare anything that was sent generally to the operating companies?

"A By publication you don't mean anything that was published in a general sense?

"Q No, not published generally, but sent generally to the operating companies.

"A Yes, but I can't specifically remember any one.

"Q What categories, though, would those documents fall in? How would you characterize them?

"A It would be a general counsels' letter.

"Q What is a general counsels' letter?

"A It is a letter that goes out generally to all the general counsel of the various companies to inform them of matters that might be of interest to them.

"Q Does the general tax attorney contribute to a publication which is entitled 'Tax Talk'?

"A During the relevant period?

"Q Yes. I should have said that. 1961 through 1972.

"A We, on occasion, were asked to review items that went into Tax Talk, but we didn't in the sense in which I understand the word contribute to it.

"Q And Tax Talk was prepared by the comptroller's office?

"A The comptroller's department, yes.

"Q During 1961 through 1972, did each of the operating companies have a general tax attorney?

"A No.

"Q Was there a tax attorney in each of the operating companies?

"A No.

"Q They had no tax attorneys?

"A Each of them didn't have a tax attorney.

"Q Some of them did?

"A Some of them did and in some of them they didn't necessarily bear that title.

"Q Was there someone in each of the operating companies that gave that operating company tax advice?

"A Not necessarily.

"Q Some there were and some there were not?

"A Yes.

"Q Generally speaking, which ones had such an attorney and which ones did not?

"A During the entire relevant period?

"Q 1961 to 1972.

"A The only one I can think of now that had a person who could really be called a tax attorney was the New York Telephone Company.

"Q And if the others needed tax advice they came to the general tax attorney of AT&T?

"A Yes.

"Q Was there someone in the operating companies, in each of the operating companies, during the period

1961 through 1972, with whom you dealt on a regular basis?

"A In each of the operating companies?

"Q Yes.

"A No.

"Q Were there in some?

"A No. I can't think of anyone in any company with whom I dealt on a regular basis.

"Q Was there anyone in the operating companies with whom someone else in the general tax attorney's office dealt on a regular basis?

"A No.

"Q During the period 1961 through 1972, did tax matters come up which had system wide significance for the Bell System?

"A Yes.

"Q And did the general tax attorney's office become involved in those?

"A Yes.

"Q Did the general tax attorney's office have any function in assisting or advising the operating companies to take a uniform approach to those issues?

"A Yes.

"Q Was the general tax attorney's office during that period consulted when tariffs were prepared?

"A I can't remember such an instance.

"Q During that period, did the general tax attorney's office make analyses of the impact of taxes on the Bell System and on its services?

"A Yes.

"Q What kind of analyses were those?

"A Well, for example, most of the Bell System companies are included in a consolidated federal income tax return and because of that there needs to be more uniformity than would be the case if they each filed separate returns as they are entitled to do, and for that reason the impact of the consolidated return on the Bell System has from time to time become important.

"Q Mr. Fuller, prior to the passage of the Excise Tax Reduction Act of 1965, did you participate in an effort to have the excise tax law amended?

"A Yes."

MR. STRUVE: Excuse me.

Your Honor, at this point and continuing I believe for all of the extract that plaintiff proposes to read from Mr. Fuller's deposition the topic concerns contacts of various Bell System people with staff members in Congress and with staff members in the

Treasury Department. I wanted to put on the record, and ask for a continuing objection, that our position is that those contacts are irrelevant to the interpretation of the Excise Tax Reduction Act of 1965.

THE COURT: I will take it subject to your motion to strike.

MR. NICKERSON: Recommencing on page 24, line 9:

"Q When did the effort which culminated in the passage of the Excise Tax Reduction Act of 1965 commence?

"A When did the activity commence?

"Q Yes, with respect to the Bell System.

"A I am not sure I can pinpoint any date of commencement of that.

"Q Can you fix a year?

"A Certainly it was underway in early 1964, but it may have commenced earlier than that.

"Q You participated in previous efforts to get the excise tax law amended, had you not?

"A Yes.

"Q An effort, for example, which culminated in a 1962 amendment to the Act?

"A Yes.

"Q In 1964, were you familiar with the

congressional staff members who were concerned with matters relating to the Excise Tax Act?

"A No.

"Q You had not met them in your previous efforts?

"A No.

"Q Had you met with people in the treasury in the efforts to amend the Tax Act prior to 1964?

"A No.

"Q Generally speaking, what was your role in this effort which culminated in the Excise Tax Reduction Act of 1965?

"A The drafting of the legislative language in the early stages of the effort that were directed towards the objectives that our people were pursuing then.

"Q Anything else?

"A No.

"Q Did you meet with any congressional staff members or members of the Treasury Department?

"A On one instance that I can remember I was at a large meeting that was attended by members of the treasury, of the Internal Revenue Service, and the joint committee, or some members of the joint committee staff, including the chief of the staff.

"Q Who was the individual to whom you were reporting at that time?

"A Mr. Victor E. Ferrall. At that time means at the time leading up to --

"Q 1964?

"A Yes, Mr. Ferrall.

"Q What was his position?

"A General tax attorney.

"Q Do you know who in the Bell System had the primary responsibility for this effort to get the tax law amended?

"A I am not sure I do know who had the primary responsibility.

"Q Did anyone?

"A The responsibility, as I saw it, was largely being conducted by Mr. Alexander Stott.

"Q He was the comptroller?

"A Yes, a vice president and comptroller.

"Q Did you from time to time during this effort talk to him?

"A From time to time, yes.

"Q Who was the principal liaison with Congress?

"Mr. Struve: By Congress, what do you mean?

"Mr. Nickerson: Anyone in Congress.

"A Elected members? Just elected members?

"Q Well, let's take elected members first.

"A I wouldn't know that.

"Q How about staff members?

"A Mr. Ronald J. Foulis, to my knowledge.

"Q And was there a principal draftsman on the part of the Bell System?

"A There were a number of draftsmen.

"Q Who were they?

"A I was one in the earlier stages and then I am not sure who succeeded me as draftsman, but I think it was principally Mr. Ferrall.

"Q Anyone else?

"A He is the only principal draftsman I remember.

"Q Do you remember any other draftsmen?

"A I think possibly a Mr. Charvat also worked with him in that effort."

"Q Anyone else?

"A I don't remember anyone else, no.

"Q Now, did Mr. Harold Snyder whom we have mentioned before have any role in this effort?

"A Yes.

"Q What was his role?

"A His role was that of organizing and directing the activities of the people in New York who engaged in the various parts of the effort.

"Q What parts were those?

"A Drafting, preparing what I presume you referred to as position papers, deciding what to attempt to have removed from the tax.

"Q Anything else?

"A That's about it.

"Q Do you know how Mr. Snyder was chosen to perform those functions?

"A No.

"Q Did a Mr. Carl Erickson have any role?

"A Yes.

"Q What was his role?

"A He was, from all I could tell, one of the draftsmen of various papers other than the actual legislative language itself.

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"A What papers were those?

"A The ones I referred to earlier. The various description papers of what services were being considered principally under the act.

"Q Did he have any other function?

"A If you are limiting that question to functions with regard to the Excise Tax Reduction Act of 1965, no.

"Q Yes, I thought that was clear.

"A I am assuming it is too, because he did have other functions.

"Q Now, if you know, what did Mr. Stott actually do during this effort?

"A Beyond exercising general oversight on what was being done, I really don't know.

"Q Did a Mr. H. P. Moulton -- is that M-o-u-l-t-o-n?

"A There is a Mr. H. P. Moulton.

"Q Did he have any role with respect to this 1965 Excise Tax Act?

"A As far as I was able to perceive, very minimal.

"Q What was that minimal role?

"A I recall that on occasion a document would have been sent to him for his inspection and he would return it.

"Q I forgot to ask you what position Carl Erickson occupied at that time.

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"A He was one of the men in the comptroller's office.

"Q And what office did Mr. Moulton occupy?

"A He was the vice president and general counsel.

"Q Now, did Mr. Romnes, to your knowledge, have anything to do with this 1964 effort to amend the 1965 Excise Tax Act?

"A Not to my knowledge.

"Q Do you know whether the board of directors of AT&T had any involvement?

"A I don't know.

"Q How about Mr. Charvat, other than the drafting that you spoke of? Did he have any other role?

"A Not that I know of.

"Q You understood that I mean that that was with respect to the 1965 act?

"A Yes, I am assuming that.

"Mr. Struve: For the record, I don't have the dates clearly in my mind, but I don't believe that Mr. Romnes was chairman of the board of AT&T during 1964.

"Q Who was, do you know, Mr. Fuller?

"A I think Mr. Kappel.

"Q Did Mr. Kappel have anything to do with the effort?

"A Not that I know of.

"Q Was there another Mr. Romnes in AT&T in 1964 that you know of?

"A Not that I ever heard of. This was Mr. H. I. Romnes who was chairman of the board that I assume you are referring to.

"Q Now, did you keep notes or minutes of any meetings that you attended, or conversations that you had, or actions that you took with respect to this effort to amend the Excise Tax Act?

"A Yes.

"Q Did you review your files in connection with this case to locate those notes?

"A Yes.

"Q Were all of the notes that you kept of those meetings and conversations and actions in 1964 preserved?

"A Yes. I don't know that they were all preserved. I'm sorry.

"Q Do you know that some of them were not preserved?

"A No.

"Q You just don't have a recollection?

"A I don't have a recollection of whether every single note was preserved."

I am moving to page 36, line 10.

"Q Do you recall a meeting of April 2, 1964 with respect to the federal communications excise tax?

"A I don't recall the specific meeting. There were lots of meetings in those days, but I just don't recall any specific meeting that long ago.

"Q They all run together in your mind by now?

"A Yes. This is something that happened a long time ago and there have been a lot of things in between and I have erased a lot of the things from my mind.

"Q I can understand that. Maybe the way to get at it is to ask you to give us the recollection that you have of what meetings you had and what was said and who was present at those meetings to the extent you recall in 1964 with respect to an effort to amend the Excise Tax Law.

"A The most that I can remember is that there were a series of meetings, some of which I was present at, some of which I was not, that at least went through the summer of 1964,at which time my role in the general tax attorney's office changed drastically and I immediately had to become involved in other things that almost completely took me away from the excise tax problems except for sporadic instances in which I was called back because of my prior involvement with the excise taxes."

Skipping now to page 38, line 22.

"Q Do you recall whether any representative of the operating companies, other than AT&T, participated in any of those meetings?

"A I don't recall any. One difficulty is, of course, that people shift around so much in the Bell System.

"Q What do you mean by that? They move from --

"A Company to company.

"Q -- from the operating companies to AT&T?

"A And the other way.

"Q He can't record you nodding your head.

"A Yes, and the other way.

"Q Is that a frequent occurrence?

"A Yes."

Skipping now to page 60.

"Q I will show you a document which I think is in your handwriting, or part of which is marked or, rather, stamped 10890-10898. Do you have the original there?

"A Yes.

"Q May I take a look at it?

"(Document handed to Mr. Nickerson.)

"Q I can't read that either.

"A You have the same trouble that other people in the office do.

"Q These are notes that you made, I take it, and you have the original before you?

"A Yes.

"Q Have you seen these notes before?

"A Yes.

"Q Do you recall making them?

"A Yes.

"Q Let's see how we can shorten this. It refers to a meeting, does it not, on November 9, 1964 at the New House office building?

"A Yes.

"Q And the participants are indicated in typewriting, are they not, on page stamped 10890,with the exception that I do not see Mr. Foulis' name in typewriting and he does appear on page 10890?

"Mr. Struve: Do you want the witness to cross-check pages 10890 and 10898?

"Mr. Nickerson: No. I think you and I can agree on that.

"Q What I am getting at is the participants were as shown on page 10890 which include Ronald J. Foulis, but I didn't want to have him read--maybe it would have been shorter to have him do so-- all those names, since they are perfectly readable on page 10898."

Now, your Honor, I would like to offer Exhibits

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72A and 72B. 72A is the notes which Mr. Fuller has identified. 72B is a typewritten copy which the parties have made for your convenience, of those notes, and the stipulation as to documents recites that Mr. Fuller made contemporaneous notes regarding some of the statements made at a conference held on November 9, 1964, at the New House office building, Washington, D.C., between personnel of AT&T and personnel from the United States Department of Treasury, Internal Revenue Service, and staff of the Joint Committee on Internal Revenue Taxation. Draft A referred to in the notes is marked Exhibit 68A. and I would now like to offer Draft A. Paragraph 68 of the stipulation as to documents recites that by on or about October 19, 1964, there had been prepared by the Office of the General Tax Attorney of AT&T drafts bearing that date of possible legislation, and Draft A, it recites, is marked 68A.

Now going back to the deposition --

MR. STRUVE: Excuse me, Mr. Nickerson.

Your Honor, with respect to Exhibits 72A and 72B, Mr. Fuller's notes of the meeting on November 9, 1964, defendants object to their admission on two grounds. One is the ground of relevance, which defendants have already reserved. These notes refer to a meeting that took place between AT&T personnel and staff members of the Congressional Joint Committee on Internal Revenue Taxation and the Treasury Department and the Internal Revenue Service. We submit that they do not have any bearing upon the construction of the Excise Tax Reduction Act of 1965.

Second, we object to the notes on the ground of hearsay. Here the testimony was, from Mr. Fuller, that he prepared these notes to jog his memory at a later date. There is no evidence that he prepared them to show to anyone else or that he did ever show them to anyone else.

As to specific points, both Mr. Fuller and Mr. Ferrall, the only other deponent who was questioned about the document, specifically stated that it was not a verbatim transcript of what was said, and as to particular statements that they could not recall any statement of that tenor or in one or two instances that they could not understand what the statement was intended to mean.

MR. NICKERSON: Your Honor, I should perhaps point out that it is stipulated that this document, which was prepared by Mr. Fuller, was directed to matters within the scope of his employment, and that it is admissible as an admission with respect to AT&T as an employee of AT&T.

THE COURT: What is the admission in there?

That is what puzzles me.

MR. NICKERSON: I am about to come to it, your Honor. I am about to refer to it.

THE COURT: You questioned the witness with respect to what transpired at the session at which these notes were made. Isn't that the testimony in the case, rather than his notes, unless the notes were used to refresh his recollection, in which event they would not be admissible, or if it contained matters that were contradictory of the testimony he gave? I think you are really piling up an unnecessary record. But to save time, I will take it under my usual rule and subject to a motion to strike and let us not spend any more time on it.

MR. NICKERSON: Your Honor, he recalled practically nothing of the meeting, and this is a statement of his as to what occurred at the meeting, and therefore it is an admission by him of what has occurred at that meeting.

THE COURT: That is your characterization of a statement of what occurred at the meeting, and obviously it is not a statement of what occurred at the meeting. It is a note that the witness made, of various persons who were present, and his comments and his observations. I think really you are going far afield in your attempt to present your case.

However, I will take it under my general rule, sitting as a nonjury judge, and I will in terms of my ultimate judgment consider only truly competent evidence and evidence that is relevant to the issues. So let us not spend any more time on it.

(continued on next page)

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MR. NICKERSON: Continuing with the question --

THE COURT: I will tell you now, frankly, I am very unimpressed by this evidence, notes taken at the time. Evidence comes in when you question the witness. Of course, this may be important for the purpose of impeaching the witness.

MR. NICKERSON: Your Honor, he recalled nothing of the meeting.

THE COURT: Well, you can't hang a man if he doesn't recall the contents of the conversation at a meeting.

MR. NICKERSON: These were notes made contemporaneously, in an attempt to summarize the transactions at the meeting. He recalled that he made those notes, your Honor, and that he attempted to summarize what the participants there said.

THE COURT: If you had the witness on the stand and if you attempted to offer it as past recollection recorded, that would be something else again.

I really must say, with due deference, that I think you are beginning to wander quite afield in the offer of massive exhibits. The testimony is the recollection of the witnesses, what actually transpired, the documents in evidence that are germane to the issues and the rest of it.

Well, go ahead in your own way. I am taking it, as I said, on that basis.

MR. STRUVE: As to Exhibit 68, which is Draft A, our only objection is to relevance, which we have already stated.

THE COURT: All right.

MR. NICKERSON: Continuing from the question on page 62, line 5:

"Q What I am getting at is the participants were as shown on page 10890 which include Ronald J. Foulis, but I didn't want to have him read -- maybe it would have been shorter to have him do so -- all those names since they are perfectly readable on page 10898.

"A I have on 10890 the initials RJF in my handwriting and someone in another handwriting has added Ronald J. Foulis.

"Q Yes. That looks like Foulis' handwriting to me from other documents I have seen, but it may not be.

"Were those the participants?"

MR. STRUVE: Your Honor, I request that those remarks be stricken It is not Mr. Foulis' handwriting.

MR. NICKERSON: I consent.

"A These are the notes that I made of the participants and I assume they must be. I really can't remember."

THE COURT: May I interrupt?

MR. NICKERSON: Certainly, your Honor.

THE COURT: On page 10890 there are the initials VEF. Who is VEF?

MR. NICKERSON: That is Mr. Ferrall, your Honor, the general tax attorney of AT&T.

THE COURT: Where is that referred to?

MR. NICKERSON: Well, he has referred to him almost all through it, and it is referred to in the testimony.

THE COURT: All right.

MR. NICKERSON: That in fact those are his initials.

Starting with line 18, now.

"Q Now, let's start with page 10891 and indicate, if you will, as you read it who the initials refer to. I think it is clear, but just for the sake of clarity.

"A LW is Lawrence Woodworth.

"Q Would you read what is said after the initials between the lines FLF?

"A FLF, which is me, handed out three column memo.

"Q Do you know what that memo is?

"A I think it is a document that is labeled draft A that compared the current law with a draft of a new law that we were discussing.

"MR. NICKERSON: Do you have that document, Mr. Struve?"

The document was produced.

"A I think it is the document that is marked 10899 et seq.

"MR. STRUVE: Through 10906."

That now, your Honor, is Exhibit 69, which I will offer. I think that speaks for itself.

THE COURT: All right. Proceed.

MR. STRUVE: Your Honor, I want the record to show the same objection, on the grounds of relevancy, to Exhibit 69.

THE COURT: Well, it is clear you object to it. You have indicated that several times.

MR. NICKERSON: Page 65, line 18:

"Q Where you have placed the initials, for example, at the top of the page 10891 there are the initials LW, and then after that some notes, is that the substance of what Mr. Woodworth said, for example?

"A As nearly as I could record it.

"Q And that's true, is it not, throughout the pages 10891 through 10897 that those are the notes, as nearly as you could recall them, of what the people said who are indicated in the left-hand part of the page, is that correct?

"A With some exceptions particularly on the page number 10897.

"Q Yes. We will hear from them, for example, in a separate paragraph.

"A Yes, and then below that.

"Q Other than that, am I correct?

"A I have not checked it carefully. There could be there are exceptions.

"Q But generally speaking that is true?

"A Yes."

Now, skipping to page 77, line 15:

"Q Do you have a recollection, present recollection, of what went on at that meeting of November 9, 1964?

"A In a general way, but not with respect to any specific events.

"Q Well, give us your recollection. Give us such recollection as you have using those notes, namely, the document stamped 10890 through 10898 to assist you in your recollection.

"A It was a meeting with Lawrence Woodworth who was the chief of the staff of the joint committee on Internal Revenue taxation of the United States Congress, members of his staff, members of the U. S. Treasury Department, members of the Internal Revenue Service and one man from the Federal

Communications Commission in order to go over with them a draft of legislation that we had worked on concerning the amendment of the Excise Tax Laws of the Internal Revenue Code, and the purpose of the meeting was to explore what was meant by the various provisions of the law and how much revenue reduction could be expected to result if various of the provisions of the draft should become law.

"Q Do you remember anything elsenow using those notes to refresh your recollection?

"A Going down my notes, I remember that Mr. Ferrall, who was the principal spokesman for AT&T at that meeting, outlined some of the problems existing in the present law, present at that time.

"He talked about and explored with the government representatives there the question of whether or not Centrex would be included in the tax or excluded. It was pointed out that the revenue loss figures that he had presented to them did not include a revenue loss for Centrex and that, as nearly as I can recall for the first time Mr. Woodworth, Lawrence Woodworth, suggested the possibility of a requirement that Centrex could be included -- could be excluded from the tax only if there were a separate charge for the portions of Centrex that would fall within the excludable definitions of the law and that he speculated on when that might occur

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because of his concern for the revenue loss that the government would suffer if Centrex were not taxed."

MR. STRUVE: Would you please read lines 6 through 11 on page 80?

MR. NICKERSON: Very well.

"Q Is that what you just said that Mr. Woodworth said at the meeting reflected in your notes?

"A Yes. Allusions to it are reflected in my notes. These notes are largely, since I am not a shorthand expert, are largely things that were taken down in order to jog my memory at a later date as to what took place at the meeting."

Skipping to page 83, line 25:

"Q Directing your attention to page stamped 10892 somewhat below the middle of the page after the initials WTG there is a statement, 'Why Centrex and PBX different prices' and then the answer from Mr. Ferrall, 'Historical?'

"Can you recall any discussion of that subject?

"A No.

"Q Do you recall Mr. Ferrall saying that it was historical that difference or those different prices?

"A No. As a matter of fact, from the position of the question mark after that I would guess that my note is meant to record the fact that he was speculating as to whether or not it was historical.

"Q Do you recall that or are you reconstructing that?

"A No. I am reconstructing from my notes now.

"Q You have no recollection at this time?

"A No.

"Q That is, as to what he said?

"A No.

"Q Do you have a recollection that he speculated?

"A No. I am again reconstructing from my notes.

"Q Now, just below that after the initials WTG there is a statement, 'If draft A law then would we try to change Centrex prices' and then after the initials VEF, 'Yes, if important or try to change tax laws or apply to rulings group.'

"Was there any discussion of those subjects that you recall?

"MR. STRUVE: You mean other than the discussion further on that is reflected in the notes?

"MR. NICKERSON: I am asking about any discussion.

"A I really can't remember specifically. I can reconstruct from my notes again what I would think that I was referring to.

"Q What were you referring to?

"A In Mr. Ferrall's response I think that what he meant was that we could change the pricing if we were unable to persuade the rulings group to let us exclude from the tax the portion of the Centrex charge that would fall within the definition of a charge for an exempt kind of telephone service, but that if we were not able to persuade the rulings group to do that, then we could either try to get a change in the law or we could in some way change the pricing to the extent necessary as a result of the ruling.

"Q Did you ever -- by you I mean AT&T -- go to the rulings group and ask them to make such a ruling?

"A Do you mean after this law was passed?

"Q Yes.

"A I don't recall, but, of course, I was not in excise taxes at this time.

"Q Did you go to them before the act was passed and ask them to make such a ruling?

"A No.

"Q I didn't think so.

"A I don't know how that would come up under the law as it was before this act was passed. I don't know what we would ask for a ruling on.

"Q Referring again to Mr. Ferrall's remark that I read, namely, 'Yes, if important' and that is just a partial quote, did he say what he meant by important?

"A I don't recall, but by reconstructing from my notes I think he meant what I have just described in a previous answer.

"Q Going back up that same page 10892 about a third fothe way down after the words or letter and word, 'L.Woodworth' it says, 'Service in this building, intercom and outside com.' I think you said, 'Where is that' and following that Mr. Ferrall's answer, 'Brings out weakness in draft. Centrex service here probably.' That is just a partial quote from his answer.

"Did he say what the weakness was in the draft?

"A I think he says it in the next sentence in that same response of his 'Draft A does not take care of Centrex, but this is because of our tariff provisions.

"Q I see. You think that's what he was referring to as the weakness in the draft?

"A Yes and then that is explained further in the portion down the page that we have just discussed.

"Q Yes. Now, in brackets about half-way down the page is, 'Describes CO and CU.'

"Did Mr. Ferrall describe what Centrex CO and Centrex CU was at that point?

"A I think so in connection with speculating what type of service they had in the new House Office Building.

"Q What was his description of Centrex CO and Centrex

CU?

"Q I don't remember specifically, but I can only speculate that he described it correctly as I previously have."

THE COURT: Pardon me. Going back a little, I don't follow you there.

MR. NICKERSON: Page 87, line 8, your Honor.

MR. HELLER: I think the Court means the page in the exhibit.

MR. NICKERSON: I am sorry. On the exhibit -- I can find that for you.

It's about in the middle of the page, a little above the middle of the page stamped 10892, and it is in rather dark brackets.

THE COURT: All right. I see it.

MR. NICKERSON: Continuing on page 87, at line 17:

"Q Now, going down about, I would think, 4/5 of page 10892 after the initials LW I will read it.

'Are we only ones who could provide PBX and Centrex type of service' and Mr. Ferrall's answer, 'No-hardware companies.' I think you said.

"A. Yes.

"Q Was there any discussion of that subject?

"A I don't recall specifically, but it looks as though the next questionby RJM and the response by VEF could be further discussion of that subject.

"Q Well, sticking to the parts that I read and then we will go on, did Mr. Ferrall say that hardware carriers could provide PBX and Centrex service or types of service?

"A Hardware companies.

"Q Companies, excuse me.

"A From reconstructing my notes, that's what I would think he intended to convey.

Going down to the bottom of page 88, line 25:

"Q Now, turning your attention to page stamped 10893 near the top of the page after the initials WTG, 'Two phones, one each for private and public?' And Mr. Ferrall's answer, 'Yes.'

"What was that discussion about?

"A It is two phones. One for each.

"Q One for each what?

"A One each for private and public.

"Q Was that in connection with PBX, do you recall, or Centrex, or both?

"A Again, reconstructing from my notes, I would think that it is a continuation of the question that RJM asked on the previous page and I think that he was speaking of a case in which a company would have bought its own PBX

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and he would then have in those days it would not be interconnected with our network and, therefore, the customer would have had to have - phone that was connected with our network for talking outside and one for the inside."

Now, passing to page 90, line 10:

"Q Now, about a third of the way down on page stamped 10893 starting with a statement apparently of Mr. Moody's, 'What is "local tariff"?'

"Mr. Ferrall's answer, "Schedule of state regulatory agencies.'

"RNF, whom I understood you to say was Mr. Flint, then says, 'Independent significance!'

"Then Mr. Moody asked, 'Consistency all over country?'

"Do you recall what that discussion was, what it was about? I should add the further answer of Mr. Ferrall's which says, 'Basically (but describes differences.'"

Then Mr. Struve said: "I should note that there are no quotation marks in the original on that line recording Mr. Ferrall's comments."

I said, "I don't think there are anywhere except where I said inner quote. I was most careful about that.

"A These portions you refer to, as nearly as I can tell from reconstructing from my own notes, was an explanation for Mr. Moody's sake of exactly what is a local exchange tariff since, as I recall, that phrase appeared in the draft of legislation that they were discussing at this point and that Mr. Moody wanted to know whether the local exchange tariffs were consistently the same all over the country and Mr. Ferrall said basically they were the same, but then he went on to describe some differences that might exist from jurisdiction to jurisdiction.

"Q Do you recall what, in substance, he said about those differences?

"A No, except there would be differences in prices.

"Q Now, going down to about, I would think, 4/5 of the page after the initials GB there is a statement which says, 'Might we be sharp enough in one year to exclude Centrex from draft A?' The answer of Mr. Ferrall, 'Maybe.'

"Do you recally any discussion of that?

"A Again, I don't specifically recall today any of the discussions that took place then except to the extent that I can reconstruct them from reading my notes, but in doing so I would think that they were trying to decide in their own minds how soon we could come up with a separate charge for the elements of Centrex which, if they had a separate charge, would then be excluded from the tax.

"Q Going down to the bottom of the page, the last two speakers, apparently, GB, Mr. Brannon, 'Is the Centrex - PBX problem the ten percent difference in price' and Mr. Ferrall's answer, 'Yes.'

"Can you reconstruct what that was about?

"A That was about the point that a person with Centrex service would have to pay a separate charge which was required and would have to pay a tax the rate of which was ten per cent at that time whereas the PBX customer would not have to pay the tax on the charges for that part of the PBX that would come within the excludable part of the law.

"Q Now, turning your attention to the top of page stamped 10894, Mr. Woodworth asked, 'Why aren't we worried about it' and Mr. Ferrall answers, 'We are, but how can it be done without statistical type of analysis. Maybe rulings people would go along with us.'

"Can you reconstruct for us, or tell us, what that was about?

"A By reconstruction, I would say that that was an expression by Mr. Ferrall of his recognition of the problem, but the hopes that if the law did not require a separate charge that a statistical type of analysis might enable the rulings people to allow us to make apportionment between that part of the Centrex charge that was for a taxable and that part that was for a non-taxable element of the service

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and he is saying maybe the rulings people would go along with us on that.

"Q I am going to read to you the next statement on page 10894 which is after the initials WTG. It says, 'Why doesn't Centrex customer just get separate phones? What does little guy get that big fellow does not get for little fellow's higher per station price buying own Centrex?'

"A I think that is 'recognizes our Centrex problem as one of pricing.'

"Q Can you reconstruct that Mr. Gibb said he recognized that your Centrex problem was one of pricing?

"A Well, that's what my notes say so I assume he must have.

"Q Well, I didn't know whether that was something you meant to indicate that he, Mr. Gibb, said. Am I correct in inferring that?

"A I think he said that he recognized the problem was one of pricing.

"Q Now, explain to me what that sentence means about the little guy. 'What does the little guy get that the big fellow does not get for little fellow's higher per station price'? Was there a higher per station price to your understanding for little fellows?

"A Well, to answer your first question, ever since

I first rediscovered and reread these notes I have been puzzling over that sentence and I have been unable to make any sense out of it.

"To answer your second question, the Centrex pricing scheme, as I recall it, had a lower per station price the greater the number of stations that the Centrex customer ordered so that might shed some light on some of the meaning of that sentence, but I don't know what the whole thing means."

MR. STRUVE: Will you please read from page 94, line 15, to page 95, line 7?

MR. NICKERSON: No; I don't think that has anything to do with the matter that I have just read, unless your Honor wants me to read it.

THE COURT: Well, in the interests of completeness we will take it.

MR. NICKERSON: All right, your Honor. I will read it.

"Q Does the next statement of Mr. Ferrall help, 'TASI described'?

"A No, that makes it even more confusing.

"Q What does TASI mean?

"A TASI is an acronym for what I think is the and sequence interpellation and it refers to the carrier technique that we employ on large carrier systems, principally submarine cables in which we utilize the gaps in conversation so that the circuit is never unused.

"In other words, if you are talking overseas and you pause to think for a moment, that part of your circuit during your pause is seized upon and used for somebody else's communication until you have completed your thought and start talking again and you either get that back or another circuit, so with that description I think you can recognize it is hard to see what on earth that has to do with the subject that we are on at the time.

"Q Let's go down to the next statement of Mr. Moody which is, 'Why couldn't you just pull things out of local tariffs' and Mr. Farrell's answer, 'Regulation.'

"Can you reconstruct what that was about?

"A My reconstruction would be that we just can't pull things in and out of tariffs, that the regulatory agencies have great control over what we put in our tariffs or take out of our tariffs.

"Q In other words, you would have to go back to the regulatory commissions in order to put a different charge in a tariff; is that correct?

"A Yes, or to make any other change in a tariff.

"Q Right.

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"Now, the next statement of Mr. Woodworth, which, if I read it correctly, is, 'Real problem is that tax base could be changed by local regulatory action.'

"Can you tell us what that was about?

"A Yes. This is one thing that I remember a little more clearly than the other things.

"Mr. Woodworth was concerned that the federal tax base could be controlled by the actions of a state regulatory commission and he didn't like that idea.

"Q Did he expand on that at all that you recall?

"A No, except that he thought that the base of a federal tax should not be within the control of a state action. I don't recall whether he expanded on it or not.

"Q You don't recall anything else said on that subject?

"A No.

"Q Did anyone that you recall from AT&T respond to what he said?

"A Not that I recall and looking at it today I don't see that there could be much response.

"Q Now, at the very bottom of the page, the last two statements of GTB is that?

"A That is supposed to be a B, Gerard Brannon.

"Q His statement is, 'Difference in PBX and Centrex'

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and Mr. Ferrall's answer, 'PBX tariff prices in hardware. Only a pricing tariff difference.'

"Can you recall what that was about or reconstruct for us what that was about?

"A Again, by reconstruction I would say that he was referring to the fact that in PBX a customer was charged on an item by item basis for each of the items that went into his PBX service, each item of hardware.

"Q The trunks, for example?

"A The trunks.

"Q And the stations?

"A The stations, the switching equipment basically.

"Q And in Centrex that was not true?

"A On Centrex, and here I am really reconstructing because it is not referred to in my notes, but Centrex, as I think I have indicated before, the customer was charged on a basis of a number of dollars per station with the precise number of dollars decreasing as he took more and more stations.

"Q Let's turn to page stamped 10895 and the very top of it after WTG, which is Mr. Gibb, he states, "If Centrex is taken out of local exchange tariff, will this take it out of tax?' After Mr. Ferrall's initial is a question mark. Can you reconstruct that for us?

"A I would reconstruct that he couldn't answer that because he didn't know what Mr. Gibb would have done in taking it out of the local exchange tariff; whether the taking it out would have accomplished in a manner that would result in the Centrex falling in a differently defined category of service than it falls in when it is in a local exchange tariff.

"Q So what he was saying was that it wasn't a clear question? t

"A It depends on how you do it.

"Q It was clarified by the next question and answer, was it not? 'If there were a separate charge for Centrex in local tariff wouldn't this take it out of tax?' Mr. Woodworth says and Mr. Ferrall says, 'yes.'

"A I would say that was clarified, yes.

"Q Do you recall his saying that, or them saying what I have read, or are you reconstructing?

"A Only because I see it in my notes."

That concludes my reading from Mr. Fuller's deposition, your Honor.

Now, your Honor, if I may, I would like to offer Exhibit 74, which is a letter of Mr. Ferrall, who has been referred to as the general tax attorney to Mr. Woodworth, and it encloses a memorandum, and I would like to refer only to one part of that, your Honor, or draw it to your attention, and that is, on page stamped 18439 of the memorandum, the first two full sentences, which say:

> "Fairly frequently, a tariff filed is challenged as providing for excessive or discriminatory charges either by the regulatory agency itself or by a customer or other third party. In the event of such a challenge the regulatory agency holds hearings and issues an order as to the validity of the tariff."

MR. STRUVE: Your Honor, our objection is on grounds of relevance, for two reasons: first, this is not part of the legislative history of the 1965 Act; and the second is that th quotation on page 18439 refers to tariffs in general and in the abstract and does not intend to refer to Centrex.

THE COURT: Well, we will take it for whatever value it has.

MR. NICKERSON: Now, your Honor, I would like to offer Exhibit 76, which is a letter dated December 17, 1964, from Mr. Ferrall to Mr. Woodworth.

THE COURT: What is the date of that exhibit?

MR. NICKERSON: Exhibit 74, your Honor?

THE COURT: Yes.

MR. NICKERSON: December 4, 1964.

THE COURT: All right.

MR. NICKERSON: Now, may I offer Exhibit 76, your Honor, a letter from Mr. Ferrall to Mr. Woodworth.

I would draw your attention to the whole document. I think it is of importance, but in particular the material starting on page 00299, under the heading "2", which discusses the question as to, "Whether we have any notion as to how long it might be before we would accomplish the separation of Centrex charges outlined above so that part might be exempted under draft A and what would be the factors involved in such a change."

Then, starting with the next paragraph, it says:

"Section 4252(a)(1) of draft A defines local telephone service by specific reference to a 'charge provided in a local exchange tariff' and only a single charge for each Centrex exchange station is provided in the local exchange tariffs currently in effect. The separation required to exempt part of this charge from tax could be made by some sort of allocation on the company's books only if a specific addition to that effect were made to draft A or if such a position were to be adopted in Treasury regulations or rulings. Therefore, we assume that tariff changes would be necessary."

And then the next paragraph talks about what would be needed to effect the required tariff charges. They would have to file in every jurisdiction.

Minimally, that would involve giving the reason for the change, showing the effect on the revenues and indicating the effect on customers as a whole and on individual customers, and it continues, if I might read it, your Honor:

"At the other extreme, especially if a customer or group of customers was prejudiced by the change, a full-scale hearing on the tariff, long and expensive, might result. In view of these considerations, no very accurate estimate can be made as to how much time would be involved even if the decision were made to proceed with the tariff changes required, and that decision would not be made lightly."

And then the next paragraph:

"At present there are no plans to amend the Centrex tariffs in this manner. If the change would reduce communication excise tax on payments for the service, however, strong customer requests for the change undoubtedly would be voiced."

THE COURT: This is consistent, of course, with the defendant's position, as I understood it this morning, that the separation could only be effected by the filing of a new tariff with the state regulatory agency.

MR. NICKERSON: Under draft A that would be true, your Honor, because draft A, as you see on page 00299, it says -- defines local telephone service by specific reference to a charge "provided in a local exchange tariff."

Now, when Congress finally passed the act -- and I am going to introduce exhibits later to show how AT&T tried to get the tariff language back into the act -- when Congress finally passed the act, they took out that language, but under draft A they would be quite right.

THE COURT: Is there any explanation as to why it was taken out?

MR. NICKERSON: No, your Honor. No explicit explanation.

MR. STRUVE: Your Honor, I think for the sake of clarity I should explain the fact that that does not appear in the section of draft A -- the reference to a local exchange tariff did not appear in the section of draft A, which defines a private communication service. It appears on the section which defines "local telephone service", and there is testimony that the purpose of inserting it in draft A was to try and delimit what is "local telephone service" from what is "toll telephone service", because the exemption provisions of later sections of the law apply differently to both.

In the old days, it was possible to define "toll telephone service" simply as a service where there is a charge for each call, which varies generally according to the distance and the time of the call.

By early 1960, services like wide-area telephone service or the 800 number had been introduced in which for payment of a single monthly charge a customer can get one or more lines over which he has unlimited toll calling privilege.

So that the old definition of toll would no longer do the job of separating local from toll, and Mr. Ferrall's hope was by inserting a reference to "local exchange tariffs" that definition would be added.

What the Congress or other people who ultimately drafted the bill did was simply to say that anything that was not toll telephone service or private communication service but that did afford access to the telephone network would be local telephone service, and they threw out any other way that limited the concept of local telephone service.

It was for that reason that they deleted that tariff reference.

The words "separate charge", which are the words before the Court in this case, were in the private communication definition of draft A, and they are in the law, and there, for reasons that I was outlining this morning, it was our understanding throughout this period that a separate charge is a separate tariff charge, because that is what the state law required.

(Continued on page 202.)

THE COURT: Mr. Struve, I am not sure that you heard my comment after Mr. Nickerson read from this exhibit. I said that the statement that he read was consistent with your position as outlined this morning, and in order to have a separate service charge you are required to file a new tariff schedule. That is only a comment now.

MR. STRUVE: Your Honor, specifically with respect to Exhibit 76, we have no objection to the document, but I think, in completeness, I should draw your Honor's attention to the first question which appears on the first page of the document, page 00294. In that first paragraph, under No. 1, Mr. Ferrall restates what he understands Dr. Woodworth's first question to be. As your Honor will see, what Dr. Woodworth was concerned about was how big was the revenue loss going to be to the Federal Government if a separate charge is instituted for Centrex. That is why he was concerned about them.

MR. NICKERSON: Your Honor, two things. I perhaps spoke a little quickly when I answered was there any evidence as to why Congress and the staff in particular took out the tariff language. There is no direct testimony --

THE COURT: You said no, as I recall.

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MR. NICKERSON: I did, and my associates remind me that I spoke too quickly.

THE COURT: You know, associates apparently serve a great purpose in this trial.

MR. NICKERSON: They do, your Honor, because what I was thinking of, when you asked that question, was whether there was any direct testimony, whether Mr. Woodworth said this is the reason I did it. There is no such testimony. But we think there is evidence, your Honor, from Mr. Woodworth's statement that Mr. Fuller has just testified to, and that is that he did not want to see the tax subject to change by state regulatory agencies. You recall that was one part of the discussion which Mr. Fuller remembered more clearly than the other parts.

So I think it is fair to say that if he did not think that it should be subject to a state action -- that was his actual words -- that that would be one reason that he would want to have that tariff language out of there.

THE COURT: May I interrupt. Of course, there is a great deal of conjecture in the deposition testimony that you just read, and if I understood the contention this morning with respect to the filing of the tariff schedule, it would seem to me that what Mr.

Woodworth was concerned with was that if a tariff schedule were filed, in order to effect a separate charge, the regulatory body may throw more of it into the separate charge and therefore the Federal Government would get less as a result. I think that is the way it can be interpreted.

MR. NICKERSON: I agree with that absolutely, your Honor, and I agree that what he was concerned about was, one, the extent of the damage that might be done to the federal fisc, because he did not know how much loss the Government would have if a separate charge were made.

When this letter came back and showed it was for their purposes, for Washington's purposes at least, a relatively minimal amount, three million six, or whatever it was, then I think he took --

THE COURT: You mean talking about federal budget or in terms of the treasury, public fisc, that is almost a grain of sand today.

MR. NICKERSON: Right. And compared to what happened with PBX, you will see on the last page of Exhibit 76, the total loss to the Government of $123 million, $120 million of that was attributable to PBX, the PBX switching equipment and stations.

THE COURT: As I understood it, PBX was already exempt, was it not?

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MR. NICKERSON: No, no, your Honor. At the time that the statute was passed, there was in effect a statute imposing a tax on general telephone service, and that had been construed to include the intercommunicating capability of PBX. That is the main reason that AT&T went out to get the exemption for private communication, and $120 million of the $123 million loss to the Government came from PBX.

THE COURT: Maybe you did not understand me and maybe I did not understand what I read in some of the briefs and also in a statement made by the Joint Senate and House Committee that PBX was receiving an exemption at the time.

MR. NICKERSON: No, your Honor. Only at the time of the passage of the Excise Tax Reduction Act.

THE COURT: That is what I was saying. By what law did PBX get the exemption?

MR. NICKERSON: Only by virtue, your Honor, of the Excise Tax Reduction Act of 1965, but not as of the date of this exhibit, 1964.

THE COURT: Are you saying there was a separate charge being made then in the instance of PBX?

MR. NICKERSON: Yes, but there wasn't --

THE COURT: And filed with the state regulatory

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bodies?

MR. NICKERSON: Yes, your Honor. But there was nothing in the statute which gave an exemption for private communication until the 1965 act.

THE COURT: All right.

MR. NICKERSON: The other point I would just very briefly make is that regardless of what they may say now, they argued to the Government, in an exhibit that you will see, that this very language that Congress took out, the tariff language which they took out, was the reason that a separate charge should be called a tariff charge. They purported to show that that was a part of the legislative history. So that they make a completely inconsistent argument at the present time.

Your Honor, may I go on to read from Mr. Ferrall's deposition?

THE COURT: How long will Mr.Ferrall's deposition take?

MR. NICKERSON: Your Honor, it will go past 5. I think maybe I could get it done by 5.

(Discussion off the record.)

THE COURT: It is ten to 5. Do you think you can finish?

MR. NICKERSON: No, I can't, your Honor.

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THE COURT: We will take our adjournment for the day. We will go over until 10:30 tomorrow morning.

(An adjournment was taken to May 6, 1977, at 10:30 a.m.)

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WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
"Alvin von Auw	76			
"Frank L. Fuller	150			
"Victor				

EXHIBIT INDEX

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9,11,8D		112
12		114

Weinfeld

DUPONT GLORE FORGAN INCORPORATION, et al.,

vs. 73 Civ. 2447

AMERICAN TELEPHONE & TELEGRAPH
COMPANY, et al.

New York, New York
May 6, 1977 - 10:30 a.m.

- - -

(Trial continued.)

THE COURT: Call the case on trial.

THE CLERK: DuPont versus AT&T.

THE COURT: Mr. Nickerson, you may proceed. You were about to read from a deposition last night, before we adjourned.

MR. NICKERSON: Yes. The deposition of Mr. Ferrall.

Let me just say a word to put us back in context and give us the legal context in which this arises. We talked about it at the end of the session.

As of 1964 --

THE COURT: You better speak a bit louder. Mr. Struve is having trouble hearing you.

MR. STRUVE: I can hear you. I was rising because we haven't got a copy of the revised designations that plaintiff was going to read this morning.

MR. NICKERSON: Would you give Mr. Struve that?

For some years, your Honor, the communications tax provided for a tax on general telephone service. That Act, going back into the early '60s, was extended each year for one year, and it expired, I believe, on July 1st of each year, and every year, Congress renewed it, and the Act that was in effect in 1964, when this, what we are about to read, occurred, when Draft A was written, was due to expire on July 1st of 1965.

The tax on general telephone service meant that even the intercommunicating component of PBX was taxed, because it interconnected -- it had the capability, PBX, to get into the general telephone network.

On the other hand, manufacturers who provided intercommunicating equipment were not entitled under tariffs filed by the Bell System with the Federal Communications Commission, to interconnect with the telephone network. Those tariffs prohibited any interconnection other than with Telephone Company equipment.

Therefore, under the statute taxing general telephone service that intercommunicating equipment of non-Bell manufacturers was not taxed and AT&T, as you will see in the documents, concluded in 1962 and 1963 and 1964, that Congress would not let the communications excise tax expire, despite the fact that the statute by its terms would have expired, but they would renew it because of the need of the government for revenue.

And so what they sought to do, as you will see in part of the letters by Mr. Ferrall to Mr. Woodworth, was to attempt to remove the tax from that portion of the Bell Company's service that had competition from these other manufacturers. That is, to say, the internal communications part.

Now, to be sure, the Bell System had a big advantage, because if you wanted to have your own equipment, non-Bell equipment, you would have to have two phones. You saw that in Mr. Fuller's testimony of the one phone for intercommunication, and one phone to get you out to the telephone network, but nevertheless, Bell felt that there was some competition, price or otherwise, which enabled these manufacturers to sell intercommunicating equipment, so that the Act now, which eventually became the Excise Tax Reduction Act of 1965, relieved the tax on the intercommunication portion of PBX service, because it was a separate charge within the meaning of the statute, because there was a separate charge for the switching equipment on the customer's premises that gave that intercommunication capability.

THE COURT: That was so before the Act had been passed, the Act we are discussing, in 1965. There was a separate charge on PBX.

MR. NICKERSON: Yes, your Honor.

THE COURT: That refers to the statement that I referred to yesterday in one of the house reports, that the PBX set-up would get the exemption in the tax immediately.

In other words, as I understand it, the telephone companies were making a separate charge in their billing to their PBX customers, as to the PBX portion.

MR. NICKERSON: Yes, your Honor, because they were making a separate charge for the station, and a separate charge for the switching equipment.

The trunks, that is, those pieces of equipment, that gave access to the telephone network, were not, of course a part of the communication, the private communication portion, and they still remained taxable under the Excise Tax Reduction Act of 1965.

So that gives you the background, which perhaps was already clear, and now I would like to read from Mr. Ferrall's deposition, and what this is directed to, your Honor, is the subject that we started to touch on yesterday, and that is the fact that the Congressional staff and eventually the Congress omitted from the statute the tariff language that AT&T had suggested.

You will recall that they defined local telephone service as a charge contained in a local tariff, and that was eventually omitted, and now we are about to show the context in which that was omitted, a part of which you have heard, and that is that Mr. Woodworth, at the big meeting of Novembe 9, 1974, said, "I don't want to see the tax dependent upon state action."

THE COURT: Well, that was the point which I asked you yesterday about.

Evidently what he had in mind is that if you allowed the various state regulatory agencies to determine which portion of the total charge in the separation should come within the excise provisions, they could increase that portion and decrease the amount that the government would receive.

I am not saying that is or isn't so, but that is the way I understand his position.

MR. NICKERSON: Right.

THE COURT: Now, that may be a bit premature, but you have offered the evidence, and as I have indicated, in a non-jury case I take practically everything that is offered, unless the case begins to run away, whether it is oral testimony or documentary evidence.

But is it your position that the discussions of proponents of a bill -- in this case you are referring to the

AT&T and its affiliated companies -- any views that they expressed, or even Mr. Woodworth's view is relevant?

MR. NICKERSON: I do say that, your Honor, with respect to Mr. Woodworth's views, and one of the reasons that I say it is that because in technical matters of this sort --

THE COURT: You say the Congress relies in large measure on this technical staff?

MR. NICKERSON: Yes, your Honor, in technical matters of this kind they must rely on it.

THE COURT: I understand your position.

All right.

MR. STRUVE: Your Honor, there were some statements in Mr. Nickerson's explanation which I do not believe the evidence will bear out. I think the evidence will show that in 1964 and 1965 AT&T was trying to obtain a complete repeal of the excise tax, and failing that, they were trying to obtain some exemptions, so that the private suppliers would be taxed rather than Bell.

Could I also put on the record, once and for all, so as not to repeat it, our objection to relevance, going to discussions had between AT&T people and Treasury staff people, and particularly, the exhibits in Mr. Ferrall's deposition, as to that, I will not repeat my objections.

THE COURT: Well, you may repeat your objections, if it makes you feel comfortable. You have repeated it, and it is already on the record, and I don't think it is necessary to repeat my policy in non-jury cases.

Ultimate determinations will be based only on evidence that is competent and relevant to these issues. I find that I save trial time in a non-jury case taking everything that is offered.

So we may proceed on that basis.

MR. NICKERSON: I will read, your Honor, from the deposition of Mr. Victor E. Ferrall, who, you have heard, was the general tax attorney of AT&T, at the dates in question.

Does your Honor have a copy?

THE COURT: Yes.

MR. NICKERSON: Starting on page 3, line 15:

"Q Mr. Ferrall, I will show you a document which is stamped in the upper righthand corner pages 10736 through 10745 and under that it has in typewriting Draft A 10/19/64.

"Have you seen that before?

"A Yes."

Your Honor, that is the Draft A, which is already in evidence, Exhibit 68A.

THE COURT: Let me see Exhibit 68A.

MR. NICKERSON: Continuing:

"Q Did you make that draft yourself?

"A Well, I had a hand in it. I don't recall that I drafted all of it.

"Q You participated in drafting it?

"A Oh, yes.

"Q Was that document discussed at a meeting at which you were present in the new Home Office Builing in Washington, D.C. in November of 1964?

"A By new Home, you mean new House?

"Q Excuse me, new House, right.

"A It is my recollection that it wasn't this 10/19. Yes, I guess that was. That was discussed, yes.

"Q And were representatives of the IRS and the Treasury Department and the Joint Committee on Internal Revenue Taxation present at that meeting?

"A What was the date of this meeting again?

"Q November 9, 1964.

"A It is my recollection that that was the meeting, yes.

"Q Was a Mr. Laurence N. Woodworth present?

"A Yes.

"MR. STRUVE: For the record, Mr. Nickerson, I believe that I should state that there are documents that have been produced in this case that show precisely who was present at the meeting and to my recollection there were no members of the Joint Committee on Internal Revenue present."

THE COURT: Pardon me. When you are referring to members of the Joint Committee on Internal Revenue, are you referring to the Senate and House Committee?

MR. STRUVE: That's correct, your Honor.

MR. NICKERSON: Continuing:

"MR. NICKERSON: I did not ask him that question. I said representatives.

"MR. STRUVE: By which you meant staff members.

"Q Did you understand that I meant staff members?

"A I understood you asked me whether Dr. Woodworth was there and he was there.

"Q Were there other staff members of the Joint Committee?

"A Well, if there were or were not, I don't recall. There was a big room full of people there.

"Q You don't recall whether there were any other members of the staff of the Joint Committee other than Mr. Woodworth?

"A I do not recall.

"Q What position did Mr. Woodworth hold on the staff of the Joint Committee, do you know?

"A Well, let's see. He was head of the staff of the Joint Committee on Internal Revenue, as I recall was his title. I don't recall what his title was.

"Q Was he the chief fellow there for the staff of the Joint Committee, as far as you recall?

"A So far as I am aware, yes."

Skipping to page 15, line 14.

MR. STRUVE: Mr. Nickerson, would you please read page 11, line 20 and read through to page 12, line 4?

(Pause.)

MR. NICKERSON: Your Honor, I will read it. I don't see the relevance here. If your Honor wishes, I will read it.

THE COURT: I don't have it in front of me. Your next page is 14. You may as well read it.

MR. NICKERSON: All right.

"Q Before your deposition today, did you take a look at Mr. Fuller's notes?

"A Yes.

"Q And you weren't able to refresh your recollection from that on this subject further than what you have testified to?

"A No. That is not a verbatim report of what was said there. Mr. Fuller took some notes there. I don't know how accurate he reported it or anything of that sort.

"Q I am not suggesting they are verbatim. I am asking you whether you looked at them and whether they refresh your recollection or not further than what you have testified on the subject that I have asked you about.

A I looked at this specific language that you are now calling my attention to, and it did not refresh my recollection at all. I didn't recall that discussion.

"Q Did it refresh your recollection on any other

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discussion with respect to why Centrex was taxable under this draft and PBX was not taxable?

"A Well, you are asking me whether this refreshed my recollection, and the answer is no, it didn't. I recall some discussion of Centrex, but this doesn't fresh my recollection."

MR. STRUVE: Excuse me, Mr. Nickerson. My request only went through line 4 on page 12. If you want to read further, that is fine with me, but ' request has already been read.

MR. NICKERSON: All right.

Now, your Honor, I am moving to page 14, line 15:

"Q Do you recall any discussion at that meeting of November 9th on what the word charge meant in that section?

"A Vaguely.

"Q Can you tell me what that discussion was and who said what?

"A I have no specific recollection of that sort. I recall that there was some discussion of how the charges for communication service of all kinds are made; that they are made under tariffs and that's all I recall, but I don't recall any specific information that was

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discussed."

Now moving to page 19, line 10:

"Q Now I will show you a document which has been stamped 11196 and 11197 and ask you whether you have ever seen that before.

"A I saw this in the papers that Mr. Struve and his people sent down to me to look at.

"Q Had you seen it before that?

"A I must have. It is in my writing, Mr. Nickerson, but I do not recall it.

"Q You have no recollection of writing that document?

"A No.

"Q Have you read it?

"A Not carefully.

"Q Would you read it over carefully, please.

"A You want me to read only the definition of local telephone service?

"A No. I would like you to read the whole thing. It is not very long.

"A The next part is incomplete.

"Q Yes. It is on the letterhead, I notice, of the Congress of the United States Joint Committee on Federal Taxation. Did you have a supply of that

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stationery in your office?

"A No, Mr. Nickerson, I did not.

"Q Would you conclude that you must have taken these notes or made this writing in Washington? Perhaps in the offices of the Joint Committee?

"Mr. Struve: Objection to that question as calling for speculation.

"Q Would you answer that?

"A Mr. Nickerson, if I had specific recollection of this I would answer you. This is some drafting that I did some place and apparently had handy some of this stationery and I did the drafting on that, but I just don't recall it beyond that and I am having to reason to come to that conclusion because it is on their stationery.

"Q All right, maybe this will help you.

"I will show you a document which is stamped 11033 through 11039. Do you recognize the handwriting, by the way, on 11033?

"A No.

"Q Have you seen that document before?

"A Yes. That's one of the papers that Mr. Struve sent to me.

"Q Have you seen it before Mr. Struve sent it

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to you?

"A I probably did, but I do not recall it.

"Q You have no recollection at all?

"A No. Not with respect to this specific document.

"Q Well, that puzzles me, that answer.

"A Well, I am not trying to evade your question, Mr. Nickerson, but you are asking me to recall something. This apparently is a draft that was being made down in the Treasury Department or in the Joint Committee by the people down there which Mr. Foulis picked up and sent to us for comments. That would be my judgment as to what it is.

"Q Now, take a look at pages stamped 11037 through 11039 and I am going to draw your attention particularly to the handwriting on page stamped 11037."

This, your Honor, is Exhibit 87 for identification, which I will hand up in a moment.

"Mr. Struve: Mr. Nickerson, if you are going to draw his attention to the handwriting, I think it would be a courtesy to me to be a better copy of the handwriting.

"Mr. Nickerson: Sure. That is not only a courtesy, but almost a necessity.

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"A Yes.

"Q Whose handwriting is that?

"A That's mine.

"Q Do you have any recollection of making that?

"A Not this specific, no. There was drafting and redrafting going on all through this period and I participated in it and apparently this is something that I had some thoughts on when it came up from Washington and I put those notes in here as to my thoughts. That's all.

"Q Okay.

"A I have no specific recollection of them. I am simply telling you what I think this is."

Now, your Honor, I would like to put before you those three exhibits -- Exhibit 90, 86 and 87 -- and before offering them, your Honor, I would like to draw your attention, on the Exhibit 90, the handwritten one, to the language about two-thirds of the way down, which says 'to which subscriber is entitled upon payment of a charge or charges," and then in brackets with a question mark in the margin, "[provided in a local exchange tariff and] without payment of a toll charge."

And I would like to call your attention to Exhibit 86, the draft which Mr. Ferrall has testified was something that he thought came up from Washington, from the government people drafting, that omitted from Section 4252(a)(2) any reference to the tariff charge.

THE COURT: Which is the one you say in Exhibit 86 omits any reference? What chapter or section?

MR. NICKERSON: It is the section about two-thirds of the way down,"to which the subscriber is entitled upon payment of a charge or charges other than a toll charge." It does not include the language of "provided in a tariff."

THE COURT: All right.

MR. NICKERSON: Then, your Honor, if you will look at Exhibit 87 for identification, you will see that is the same language on the first page, the page stamped 11037, except there is some handwriting of Mr. Ferrall's. And after the word "charges," about two-thirds of the way down, in Mr. Ferrall's handwriting, are the words 'provided in a local exchange tariff and without payment of" a toll charge.

I offer those three exhibits, your Honor.

THE COURT: They may be received under my precautionary statement that I have made so often here.

You know, it may be -- and I am not deciding that now -- that some of this may have some relevance under the conspiracy charge, but I must say that, as I intimated in my question to you, as to the process of draftin the minutiae of legislation and the changes that go into it by persons who do not actually vote on the bill and who don't have final responsibility for voting, this is indeed very questionable. That is all I am going to say about it now. You can go on with it.

MR. NICKERSON: All right, Judge.

MR. STRUVE: My position as to the offer of Exhibits 86, 87 and 90 is that we have no objection to receiving Exhibit 86 for what Mr. Ferrall was able to testify about it, that apparently it was something that came from someone in Washington.

We do object to Exhibits 87 and 90, not only upon our general ground of irrelevance, but also upon the specific ground that there is no evidence that Mr. Ferrall communicated either Exhibit 87 or 90 or the substance of them to anyone other than himself, and in particular to anyone other than AT&T. If they were simply notes that he made for his own use and working through what Congress had done, their irrelevance would be clear, I think, to anyone.

THE COURT: I just commented with respect to your objection when I passed my most recent remarks.

MR. STRUVE: Could I also make a clarification with respect to the significance of the local exchange tariff language, which ties in with what Mr. Nickerson was trying to argue?

If your Honor will look at Exhibit 86, which is the document that Mr. Ferrall said apparently came from someone in Washington, and specifically the definition of local telephone service, which is on page 11034, your Honor will see that in that definition what the draftsman had essentially done is to define local telephone service as being any service which affords access to the public telephone network except for, and this is in the last sentence, the last two sentences, a toll service or a private communication service.

In other words, what the draftsman has tried to do here is provide that every service which afforded access to the public telephone network is in one of these three categories, and that there is no service which falls through the crack.

Going back to the purpose of the local exchange tariff language in draft A, which Mr. Ferrall will testify to in the excerpt which your Honor is about to hear, that was to define local telephone service in a self-contained manner and without reference to other services.

Your Honor will recall from Dr. Woodworth's remarks that what he and other Government people were concerned about is that if the local exchange tariff language was retained as part of a definition of local exchange service, then somehow an exchange service, theoretically at least, could be taken out of the federal excise tax realm altogether and fall through the crack. If it were taken out of the local exchange --

THE COURT: Didn't you make that argument yesterday?

MR. STRUVE: I am sorry, your Honor, I did, but Mr. Nickerson repeated his argument about the significance of the removal this morning.

THE COURT: I think I will have to ask the lawyers to refrain from arguing these matters now, and suggest you save it all for a proper time. Otherwise we will be here much longer than you anticipated. I am giving you a great amount of leeway, but I think that we have to establish a point of outer limits.

MR. NICKERSON: May I proceed?

THE COURT: Yes.

MR. NICKERSON: Continuing on, at line 13, page 22:

"Q Yes. Let's take a look at the handwriting after the word charges about two-thirds of the way down that page and it is inserted, 'provided in a local exchange tariff and without payment of.'"

Your Honor, that is the reference to his handwriting on Exhibit 87.

THE COURT: What page are you reading from in the deposition?

MR. NICKERSON: Page 22, your Honor, and I have just read lines 13 through 16. And I was just orienting your Honor to what we were referring to there as the handwritten language of Mr. Ferrall on Exhibit 87:

"Do you see that?

"A Yes.

"Q Do you recall making that handwritten note on the draft?

"A No, I do not recall making this specific note on this draft, Mr. Nickerson. I recall that I in the initial drafting stages was concerned with the thought that we ought to have that language in this draft.

"Q Why were you concerned with that?

"A Well, to identify what local telephone service is as distinguished from some of these other services that were being supplied.

"Q In other words, toll telephone service would not be in a local exchange tariff, is that correct?

"A Well, I will have to have some help from some of the rate technicians.

"Q No. I am just trying to get at your thinking at the time.

"A Well, I did not know that the charges for what in the telephone industry is referred to as POTS, plain old telephone service, is in the local exchange tariff and I had some vague recollection that I thought some reference should be made to that in defining local telephone service."

Moving to page 25:

"Q Do you recall whether any other drafts were received from the Joint Legislative Committee other than the one that you have seen, 11034 through 11036?"

Which is now Exhibit 86, your Honor.

"Mr. Struve: Objection. I don't believe there was any testimony that 11034 through 11036 was received from the Joint staff.

"Mr. Nickerson: No. I thought he said that was one that Mr. Foulis picked up. Maybe I am wrong. I will have to clarify it.

"Q I thought you said that the way you reconstructed it was Mr. Foulis had picked up 11034 through 11036 from the Joint Committee staff. Am I wrong about that?

"A Only in the specifics. There was about this period in May of 1965 that I remember that the people down in Washington, and by that I mean people in the Joint Committee staff group and in the Treasury group, were engaged in intensive drafting in this area. They had to look to us for technical help and be sure that the words that they were using would have meaning, not only to the tax people, but to the people in the telegraph industry and that sort of thing, and they were making their interim drafts to Mr. Foulis and he was sending us copy either by teletypewriter or by reading them to my secretary over the telephone and they were for the purpose of our help and assistance in being sure that correct technical language was being used.

"Q So that there was more than one draft that you received via Mr. Foulis from either the Treasury or the staff, am I correct?

"A I have no specific recollection, but I think I saw yesterday in the papers that you brought out in this discovery some other drafts that had been brought up one way or the other, but I have no recollection of them.

"Q Let's look at a document which is stamped 1104 through 1106" --

THE COURT: 11054.

MR. NICKERSON: 11054 through 11060."

Your Honor, that is Exhibit 89 for identification.

"Have you looked at that before?

"A In connection with review of the papers that you brought out in this discovery, yes.

"Q And had you seen it before then?

"A I assume I had. I sent it to Mr. Fuller. That's my handwriting at the top of that document.

"Q Do you recognize that as one of the drafts that came from either the staff or the treasury?

"A I can only recognize it by reasoning. I think it is noted that's my secretary's handwriting up at the right corner and she probably identified it as having come in on teletypewriter, but I don't have specific recollection of it.

"Q And if it came in by teletypewriter it would have come from Washington? Is that the inference you would draw?

"A That would have to be the inference I would draw. I am quite sure it would come from our Washington office at that time.

"Q Do you recognize it as language that you yourself drafted?

"A No.

"Q Have you read it over carefully, Mr. Ferrall?

"A Not carefully, no.

"Q Take a minute, would you, just to take a look at it.

"A Okay. Now, do you want me to read this whole document, including the reduction of rates and that sort in the early part of it?

"Q I would like for you to read it enough so that you can tell us whether it will refresh your recollection as to whom it came from. That's what I am really interested in.

"A Well, that I can't give you a better answer than I have given you now. I have no recollection beyond what I have given you now. I assume this was one of the drafts that were coming out of Washington during this intensive drafting period for our comment, but beyond that I don't know.

"Q Let me ask you this. Maybe we can get at it this way.

"Was the drafting, as far as AT&T was concerned, being made by your office here in New York?

"A We are not in New York now. You mean in New York when I was there?

"Q That's what I mean. I am not talking 1976. I am talking 1965.

"A Yes.

"Q Did you understand that with these previous questions?

"A Oh, yes, but you referred to here in New York and we are not in New York, Mr. Nickerson. We are in Flemington, New Jersey.

"Q How well I know it. Thank you very much for refreshing my recollection on that subject.

"Mr. Struve: Objection to that comment."

MR. STRUVE: Your Honor, may I add, for clarification of that, that Mr. Ferrall had been retired for some years and understandably wanted to be deposed in the county seat of the county in which he now resides.

THE COURT: I don't know what the comments have to do with the case, the observations of both lawyers, Mr. Nickerson's comment and Mr. Struve's.

MR. NICKERSON: I think I should have left it out, your Honor.

"Q Was the drafting in 1965 and 1964 that was being done by AT&T being done in New York?

"A Well, so that I can understand your question, let me tell you we made Draft A back in 1964. That was the basis of discussions that went through the various departments of the government that were interested in this and was the basis of subsequent discussions.

"Q That was made in New York, Draft A?

"A Yes, in my office.

"Then, after those preliminary discussions were had, the people on Dr. Woodworth's staff and some of the people in the Treasury, and there may have been some out of the Internal Revenue Service, I don't know, but they gathered together and were doing drafting based on that and they from time to time would ask us for help as to technical language and would make drafts available to see if we had any comments. We, after all, were the collecting agent of this tax and we had to understand it and that's what transpired. Now, I recall that broad overall picture and I hope that will help you in your questions.

"Q Yes, it does help me. Thank you very much.

"Let me follow up on it.

"Was any of AT&T drafting being done in Washington in early 1965?

"Mr. Struve: What do you mean by early 1965?

"Mr. Nickerson: Well, from January through June of 1965.

"A Well, you just showed me a draft that is on Joint Committee stationery which is in my handwriting. I assume that I was doing a little drafting to help them when I was down there, but I don't recall that.

"Q Was anyone else, other than yourself -- strike that.

"What I am trying to do, Mr.Ferrall, is to identify as best we can whether this document 11054 was drafted by someone on the Joint staff or the Treasury, or whether it was drafted by someone in AT&T.

"A I am quite sure that we did not draft this particular document."

Now, your Honor, I offer Exhibit 89, which has been identified, and the only purpose of offering it is to show, and it appears on the bottom of the page stamped 11055, that it refers to a charge or charges, other than a toll charge, and it does not contain the tariff language which was in the Draft A and which was in Mr. Ferrall's handwriting.

MR. STRUVE: Your Honor, our position on Exhibit 89 is the same as Exhibit 86.

THE COURR: I think your position on Exhibit 89 is even stronger. The witness' answer is, "I am quite sure that we did not draft this particular document."

MR. NICKERSON: Yes, your Honor.

THE COURT: How do you hold the defendants on this?

MR. NICKERSON: I am simply showing that they left out -- that Congress left out that language.

THE COURT: Who left out that language?

MR. NICKERSON: That is a staff draft, and eventually when the Act was passed, the tariff language --

THE COURT: The Act itself doesn't have the language that was suggested originally with respect to tariffs.

MR.NICKERSON: Right, your Honor.

THE COURT: That is why I don't understand why you are laboring this whole point. It may have some significance with respect to the conspiracy charge, and that is even doubtful.

MR. NICKERSON: Let me move on, your Honor.

THE COURT: What do you want to add to what I said?

MR. STRUVE: Simply with respect to the time sequence, the assumption is implicit in the plaintiffs' --

THE COURT: You better raise your voice, Mr. Struve.

MR. STRUVE: The assumption is implicit in the plaintiffs' pretrial memo that Exhibit 89, which your Honor has just received for what it is worth, came after Exhibits 86, 87 and 90. I merely wanted to note for the record that there is no evidence that that was the time sequence.

MR. NICKERSON: And I don't think it would make any difference.

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MR. NICKERSON: Your Honor, at the bottom of page 30:

"Q Now I will show you another document. This one is stamped 11075 and 11076."

That is now Exhibit 85 for identification.

"You see the notation at the upper right which as I read it says prepared by VEF and Foulis 5/14 for Mr. Kappel and Mr. Mills conference. Have you seen that document before?

"A Yes, I saw this in connection with your discovery papers.

"Q Can you tell me whose handwriting that is in the upper righthand corner?

"A That's my handwriting.

"Q Do you recall now that you and Mr. Foulis prepared this on the date indicated, May 14, 1965" --

It says from Mr. Kappel. It should be for Mr. Kappel.

"A I have a vague recollection, Mr. Nickerson, that after some of the other conferences down in Washington Mr. Foulis and I got together in the Washington office. Mr. Foulis said this statement had to be prepared for Mr. Kappel and he and I ran this off in an hour or so one afternoon in that office. That's the only recollection I have of it.

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I did not recall it until I saw it here in connection with your papers."

I would like to put that before your Honor, if I may.

"Q I would like for you to read through that, will you. Mr. Ferrall, and then I am going to ask you some questions about it.

"A Yes, Mr. Nickerson.

"Q Referring you to the second full paragraph on page stamped 11075 which starts with the words, 'Upon presentation of this problem to representatives of the Treasury Department and the Staff of the Joint Committee...', when was it that that presentation was made, do you recall?

"A Well, there were several and I will be glad to enumerate them. It started with a conference in the Treasury Department with Mr. Stanley Surrey who was then, I think, assistant secretary in charge of tax policy. That's where it started and that's where, as I recall, the first exposure of our Draft A was made and then there was the big conference, which I recall.

"Q That's the November 9th conference that we have discussed?

"A Yes, that resulted from our discussions with Mr. Surrey and then from there on out I don't recall any specific conferences although there were telephone conversations and things of that sort during this drafting period.

"Q So you remember only two conferences, am I correct, with the Staff and Treasury?

"A Well, those are all that I remember, but if you would ask me to try to arrive at a reasonable conclusion, I would assume there were others, because I was going down to Washington frequently to be helpful in this regard.

"Q How frequently did you go down?

"A I don't recall. I was going down quite frequently.

"Q Once a week maybe?

"A I don't think it was that, but whenever they would arrive at a puzzling technical problem and need the help. There were others. The telephone industry and the independent telephone industry were all involved in this.

"Q Which meeting, if you know, is referred to in the second full paragraph, the first few words, 'Upon presentation of this problem to representatives of the Treasury...' Is that to the Surrey meeting?

"A That would refer first to the Surrey meeting and then to the big meeting that you have asked me questions about, Mr. Nickerson.

"Q To both of them?

"A I think so.

"Q Do you recall who was present at the Surrey meeting?

"A From our organization Mr. Stott and I. I think there was nobody else from the Bell System. There was Mr. Surrey. My recollection is that Mr. Woodworth was there and I recall Jerry. Was it Brennan?

"Q Or Brannon?

"A Either Brennan or Brannon and it is possible that Mr. Foulis was there, but I don't recall that. It seems to me there was one other government person there, but I don't recall that.

"Q Was it at that meeting where Mr. Surrey was present that they agreed that the communications excise tax should not affect an economic choice on the part of the consumer?

"A Well, not in so many words. What that meeting was was the opening up of our position that this tax had become to the communications industry a serious competitive handicap and the discussion there which went on for about two and a half hours was primarily between Mr. Surrey and me as to what were our competitive services that fell into this area.

"Q Take a look at the next paragraph which starts, mplt 5 "Ferrall

'A proposed revision of the existing excise tax law was prepared to accomplish this result.'

"Was that the Draft A that we already looked at?

"A I would only have to reason an answer. I don't know specifically what we were referring to then, but it probably was Draft A, Mr. Nickerson."

Now, your Honor, I offer Exhibit 85, and in particular, the last three paragraphs of it, in which reference is made to discussions with AT&T people and Treasury and Staff, disclosing some difficulty in drafting the law, in terms that are easily understood, and the last sentence of that paragraph, "Because of this difficulty, there may develop an inclination on the part of the Treasury to abandon the effort to correct this inequity.

"We urge that the effort be carried forward even though there may be some imperfections of language in the final result."

THE COURT: You are offering that now?

MR. NICKERSON: Yes.

MR. STRUVE: I object, because there was nothing here regarding Centrex. There were proposals regarding other services.

THE COURT: Well, as I read this, I don't understand your objection at all. This has indicated the great mlpt 6

difficulty in drafting legislation particularly involving terms that are peculiar to an industry.

MR. STRUVE: I agree, your Honor, I merely wish to underscore --

THE COURT: All right. I have noted your objection. I am receiving it under my usual ruling.

Let me just go back to that.

I am fully aware of what I think Mr. Nickerson is going to argue, but it seems to me you have rather a substantial counter-argument in this document. But I am used to lawyers taking positions they do with respect to a matter of this type.

MR. NICKERSON: I'm sorry. I didn't catch that, your Honor.

THE COURT: I am simply suggesting that reading that document, I have a little difficulty in understanding why Mr. Struve objectes so strongly. I said I am aware that you would make one argument with respect to it, assuming it is relevant, and that Mr. Struve is in a position to make a counter-argument.

MR. NICKERSON: May I hand up to your Honor the reports now of the House and Senate Committees. They have been marked as Exhibits 270A and 270B. I don't think I need mark them in evidence at this time.

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The critical language concerning the excise tax is in the House report, pages 1676 through 1678, and the identical language is in the Senate report on page 1724 through 1727.

THE COURT: On 270A page 1676, where is the specific language to which you make reference?

MR. NICKERSON: I simply referred you, as that is the page, your Honor, where the communications excise tax portion starts. It does have significant language in it, your Honor, for example, under A it says, "Your committee concluded that the tax on local and toll telephone service and typewriter exchange service is undesireable as a permanent feature of our excise tax," and it says, three sentences later:

"However, while elimination of the tax is desireable on the grounds listed above, your committee has concluded that since the tax is an important source of revenue for the federal government, reductions should be staggered over a period of years" -- which the bill provided for.

Then, your Honor, we also see in subsequent years they extend it further.

THE COURT: All right. You are going over the same argument as before. I understand your position.

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All right. We will take our mid-morning recess.

(Recess.)

THE COURT: Proceed, please.

MR. NICKERSON: May I hand up the remarks of President Johnson at the signing of the Excise Tax Reduction bill, dated June 21, 1965. We have marked it as an exhibit, Exhibit 269B.

All I would refer you to, your Honor, is the third full paragraph on the page numbered at the bottom of the page 692, which recites:

"The enactment of this bill reflects the confidence of the Administration and Congress that the benefits of the Excise Tax Reduction Act will be passed along to the American consumer. We can expect no less in our competitive American business system."

On page 693, the first full paragraph, on the righthand side, the first sentence:

"...and this excise tax bill will make a contribution to our economic health only if the benefits to the consumer are passed along from the reduction of the taxes."

THE COURT: You left off the last sentence.

MR. NICKERSON: "And today I urge every manufacturer and every retailer to do just that."

THE COURT: All right.

MR. NICKERSON: Now, your Honor, picking up with Mr. Ferrall's deposition and moving to page 52, line 19 --

MR. STRUVE: Excuse me, Mr. Nickerson, would you please read from page 45, line 8 --

MR. NICKERSON: I am going to read from that but not right now, because it doesn't come chronologically in the matters I want to take up, but I will read that later.

Moving to page 52, line 19:

"Q Did there come a time when there were discussions as to whether the Bell System companies would separate the unrestricted Centrex charge?

"A The only time that I recall that that was discussed was at the time that I was preparing the letter to Dr. Woodworth which you have just asked me to look at and, as I recall, I talked to our people then as to whether there was any immediate plans to try to separate that charge since Dr. Woodworth was concerned with the impact on the revenu that any change of that sort might make and you saw what I said in my letter, which was a reflection of the response that I got from our people; that there is no immediate plans to do it.

"Q And who were those people that you got that response from?

from?

"A I do not recall. I would have talked to people that are concerned with regulatory matters and things of that sort, but I don't recall who they were.

"Q You don't recall the names now of who was concerned with regulatory matters that you might have talked to?

"A Mr. Nickerson, I can only repeat I talked to literally hundreds of people throughout this whole period and I don't recall specific conversations with any of them. I don't even recall half the names. I recall George Spalding and that's the only one at the moment that I recall.

"Q Wasn't there someone who would have a responsibility in AT&T to make a judgment as to whether the Bell companies were going to separate or not?

"A That judgment wouldn't be made at AT&T. These are local tariffs and that judgment would have been made in each of the separate companies.

"Q I see. Each one would make a separate judgment as to whether they wanted to separate the tariffs or not, is that correct?

"A They would have to make judgments in light of their particular regulatory system -- situation, excuse me, I didn't mean to say system -- their particular regulatory situation as to whether they wanted to go ahead or not go ahead with an attempt to make that separation.

"Q And each one of the operating companies would have been free then to make a determination as to whether they would separate it or not?

"A I can only assume so. That's the way it always was.

"Q It always was that each operating company was on its own with respect to those matters?

"A Each one of them had to run their businesses in their own territory and in light of their own problems and has, so far as I knew, I was not a top officer of AT&T, but as far as I knew, they had quite a lot of discretion as to how their particular business must be run.

"Q Was there any discussion at around this time in which you participated -- and I am referring to December of 1964 -- as to whether or not the operating companies would pursue a uniform policy with respect to whether they would separate or not separate an unrestricted Centrex charge?

"A I certainly recall no conversation of that or as to that specific question, Mr. Nickerson."

Moving to pa[illegible] line 9:

"Q Do you recall any discussions in or around this time, namely, November-December 1964, as to whether the Bell companies should separate the unrestricted Centrex charge?

"A I recall only that I discussed with somebody around there, and I don't recall who it was, the question that Dr. Woodworth had asked, and that is was there any contemplation at that time of making an attempt to separate that charge. What I mean by making an attempt is you would have to get regulatory acquiescence in such action as that and they said that there were no plans under way that they knew about at that time and that was the response I gave to Dr. Woodworth.

"Q Did they say why there were no plans to do that?

"A Only in the area of what I revealed in my letter there and that is that it would be a big job and might result in rate case considerations that would go way beyond this specific question and I explained that to Dr. Woodworth in my letter."

Passing to page 72, line 13:

"Q After the date of your letter to Mr. Woodworth dated December 17, 1964, did you participate in any discussions as to whether the Bell System companies would separate -- at any time after this -- would separate the charges for unrestricted Centrex service?

"A I don't recall any such discussion. My recollection is that we had answered that question to Dr. Woodworth's satisfaction and that was the end of it."

Passing now to page 80, line 5:

"Q Well, couldn't you have provided in Draft A that an allocation on the company books approved by the rulings people of the portion of the charge which was for private communication would be so and so much and that that would not be taxable?

"A On the basis of hindsight, we could have tried it, Mr. Nickerson, but whether they would have accepted it or not, I don't know. It was apparently assumed that they wouldn't accept that all the way through this discussion.

"Q You assumed that they would not accept that?

"A I say it was apparently assumed that that would not be acceptable all the way through that because I mentioned that in my letter to Dr. Woodworth and there was apparently some discussion at this meeting about that that was mentioned, but wherever it was mentioned it just seemed to be assumed that nobody would accept that in the government.

"Q But Mr. Woodworth did not say it would be acceptable, did he?

"MR. STRUVE: Objection. Argumentative.

"A I don't know whether he said that or not. He didn't say in my presence it wouldn't be.

"Q Now, turn, if you would, Mr. Ferrall, in your letter dated December 17, 1964, to page marked 00300 and to the third sentence in the full paragraph on that page which starts with the word, 'Minimumly.'"

This, your Honor, is Exhibit 76.

THE COURT: Before you go ahead, I want to see Exhibit 76.

MR. NICKERSON: Your Honor, the third sentence in the first full paragraph on that page.

THE COURT: All right.

MR. NICKERSON: Continuing:

"'Minimumly, this would involve giving the reason for the change, showing the effect on the company's revenues, and indicating the effect on customers as a whole and on individual customers.'

"Do you see that?

"A Yes.

"Q Now, if the amount of the total charge to the customer was not changed, but merely separated in the tariffs, what would be the effect on the telephone company revenues?

"A I don't understand your question.

"Q Well, my understanding is that when the Centrex charges and tariffs were finally separated in 1971 that the total charge for the service was not changed; that it was just split into two parts: One was for, I believe, Centrex intercommunications service and the other was Centrex exchange access, but the total charge remained the same as it was done.

"MR. STRUVE: May I state for the record at this point that whether or not that is the case is shown by the individual tariffs applicable in each individual jurisdiction and my understanding is that it was not invariably the case that the exact charges were the same.

"MR. NICKERSON: Well, it certainly was so in some instances."

Parenthetically, your Honor, we will show that it was the same in all but one instance, maybe two instances.

"Q If that were the case and the total charge was not changed, what would be the effect on the telephone company revenues?

"A Well, if I understand your question, there wouldn't be any effect, but this sentence relates to what you have to show, not what would or would not be the effect.

"Q I understand that. So that you would have had to show in the supposition that I have made that there would have been no effect on the company's revenues, is that correct?

"A Presumably you would. I am not a rate man.

"Q Would there be any effect on the customers as a whole under the supposition that I made?

"A I'm sorry, I can't answer that. You are getting into an area in which I have no expertise. I don't know whether it would or would not be.

"Q Well, if the total charges were the same, Mr. Ferrall, it wouldn't affect the customers would it?

"A Well, if you want to reason that way and are satisfied with that conclusion, fine. I just don't know what would be involved in this.

"Q Well, what did youhave in mind when you wrote the language in this sentence that we have just read together? Did you have in mind that there would be an effect on the company's revenues?

"A No. I said 'Minimumly this would involve giving the reason for the change, showing the effect on the company's revenues...'

"What I meant was showing it sometimes in a hostile atmosphere where it might be questioned, so you would have some problems of demonstrating it first to the commission and then to any objectors that might be in there. That was what I had in mind.

"Q What were the things that you had in mind which would make them hostile to simply a separation of the charges?

"A This is a regulatory proceeding and if you read even the newspapers, Mr. Nickerson, you know that customers come in and object to this and object to that and develop oftentimes a hostile atmosphere, so that just showing that it didn't affect them might be quite a job. That's what I was trying to say here. Maybe I didn't articulate it very well.

"Q Well, let's read the next sentence on the same page, 00300:

"'At the other extreme, especially if a customer or group of customers were prejudiced by the change, a full scale hearing on the tariff, long and expensive, might result.'

"What did you have in mind when you wrote that as to the prejudice to a customer or group of customers which would occasion a full scale hearing?

"A I have no recollection of what I had in mind at that time.

"Q Did you have in mind, for example, that the total charge might be changed? The total charge to the customer, that is?

"A No, I recall that I had in mind trying to articulate. I was a lawyer here trying to articulate something, the two possible extremes of a regulatory proceeding that might result if this tariff change were requested by a company, or for that matter by a customer; that it could go through easily with maybe a minimal showing of impact on the customers that might or might not be questioned, or it could become a full scale rate case going way beyond this specific question of simply splitting this tariff charge.

"Q In other words, some customers might they they were prejudiced even though they weren't? Is that what you mean?

"MR. STRUVE: I object to that question as argumentative."

And I asked another question:

"Q I have difficulty understanding, Mr. Ferrall, your language here, unless there was a change in the charges, unless by that you mean that a customer or group of customers might think that here is a chance to attack the rates even though we may not be prejudiced. Is that what you had in mind?

"A That was a possibility that I had in mind in this second sentence. Whenever you open up tariffs you may get a full rate case."

(Pause.)

wcrl

MR. NICKERSON: That concludes for now my reading of Mr. Ferrall's deposition, but I am going to come back to it, your Honor, where it fits in chronologically elsewhere.

And now I would like to offer Exhibit 75, which is a memorandum of Mr. Charvat, whom you have heard of, who is in the office of the general tax attorney. And I should say parenthetically now that I am going back to showing the initial decision not to separate the Centrex rates.

This memorandum, the portion which I would refer your Honor to -- and it is a draft for Mr. Ferrall of the letter that eventually became Exhibit 76, the letter dated December 17, 1974 -- what I would like to refer your Honor to are the two pages 00306 and 00307. The particular sentence I refer you to "would present a new opportunity for objecting to the tariff as a whole."

THE COURT: I have read it already.

MR. STRUVE: Objection on grounds of irrelevance and hearsay.

The letter that Mr. Ferrall wrote to Dr. Woodworth is in evidence. We don't see either the probative value or relevance of a prior draft of that.

wcr2

MR. STRUVE:I might add that both Mr. Ferrall and Mr. Charvat were asked questions about that draft in their depositions and they could not recall any reasons for any changes.

THE COURT: All right.

MR. NICKERSON: Now, your Honor, I would now like to read from the deposition of Mr. Weber, who was the exchange rate supervisor.

THE COURT: Pardon me. You have offered this in evidence?

MR. NICKERSON: I have offered it, your Honor.

(Plaintiffs' Exhibit 75 was received in evidence)

MR. NICKERSON: Mr. Weber, your Honor, it is stipulated, was the exchange rate supervisor, and the one, you will hear from the testimony, who made the basic decision not to separate the rates.

So may I start with page 3, line 14.

MR. STRUVE: Excuse me, Mr. Nickerson.

Your Honor, before plaintiffs commence reading from Mr. Weber's deposition I should make a statement for clarification for the Court.

We have designated Mr. Weber as one of the witnesses whom we will present to the Court to testify in open court. Plaintiffs have nevertheless designated the bulk of his deposition to be read in. If they wish to do this, we have no objection, even though Mr. Weber is quite clearly not a managing agent of AT&T.

But we did want to make it clear for the Court that the reading of this deposition is going to be substantially duplicative of what the Court will hear from Mr. Weber himself if the case comes to that point.

MR. NICKERSON: Your Honor, he plainly is a managing agent under your Honor's decision back in 195--

THE COURT: In Erie Railroad?

MR. NICKERSON: Erie Railroad.

THE COURT: That is the case, isn't it, Krause against Erie Railroad?

MR. NICKERSON: Yes, it is, your Honor.

THE COURT: Well, I am not saying that he is or he isn't. I haven't heard a word about what his functions are.

MR. NICKERSON: All right.

THE COURT: Mr. Nickerson made the statement that Mr. Weber was a man who made the decision with

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respect to the separation of charges.

You are shaking your head, so let me repeat again, statements by counsel are not evidence. Let's get the evidence.

MR. NICKERSON: May I start at page 3, line 14:

"Q Mr. Weber, by whom are you employed?

"A American Telephone & Telegraph Company.

"Q When were you first employed by AT&T, I will call it for short, if that is all right?

"A By AT&T, the so-called parent company, August, no, I beg your pardon, January 1, 1963.

"Q Prior to that time, had you been employed by some company in the Bell System?

"A Yes.

"Q What one was that, for the first time?

"A New York Telephone Company.

"Q Would you give us a chronological account of your employment with the Bell System stating the positions you held starting with when you first started with New York Telephone Company up to the present.

"A Yes. I will try to state the ones I can recollect. There were many, particularly in my early career.

"Weber

"I joined the New York Telephone Company in May of 1948 as a staff assistant in what was then known as the plant department. I worked in a variety of jobs with various lower level titles in that department until 1955 when I moved to what was then known as the traffic department. I was a traffic manager coincident with that move.

"About 1956 I became a district traffic manager and worked in a variety of assignments in various places, particularly in Manhattan, Bronx and Westchester.

"Subsequently, about 1959, I transferred to the New York Telephone Company engineering department for about a year.

"After that, to the personnel department as a benefit secretary for another year and about 1961 I joined the rate organization on the corporate staff of the New York Company where I worked on a variety of rate matters.

"About August 1962 I was transferred or perhaps a better term would be loaned to the AT&T Company on a temporary assignment and in January of 1963, that temporary assignment was made permanent when I joined the payroll of American Telephone & Telegraph Company as, I think it was a staff engineer I think was the title.

"In August of 1963 I became exchange rate supervisor and perhaps about 1968, and here my recollection is not too clear, because the change was a nominal one only. It was only a change of title. I became marketing manager.

"In August of 1971 I was transferred to my present position, which is that of business relations manager in the state regulatory matters department.

"Q What were your duties as a district traffic manager, what did they consist of?

"A District traffic superintendent. The first assignment I mentioned I think in '55 was traffic manager. It was a staff job here in Manhattan where I was involved primarily in personnel staff activities for the traffic department. The traffic department having the broad responsibility at that time of operating and managing the operator forces, the telephone operators, as you would know them.

"The district traffic superintendent job, and I had held several of them in different locations, was that of a line manager handling a traffic district which would include the management and operation of a number of traffic switchboards as well as the management of dial systems within that particular district.

"Q When you became a member of the rate organization of the corporate staff of New York Tel in 1961, what were your duties in that capacity?

"A My duties in that assignment were largely the development of rates and charges for specialized services. Generally services which were not general offerings in our tariff, but were services provided either to customers who had very unique and limited requirements which we would meet under what were and still are known as special assembly provisions of our tariff.

"Also some responsibilities in connection with development of special contract rates for other carriers.

"Q What other carriers are you referring to?

"A Specifically, I recall development of charges for entrance channels for international record carriers such as RCA and so forth.

"As an example, they would have a radio, an overseas radio terminal location outlet, say, in the end of Long Island and in order for them to reach that radio terminal location from their office in New York, they would lease from New York Telephone Company wire

wcr8 "Weber

facilities or perhaps microwave facilities.

"Q As a member of the rate organization of New York Tel in 1961, 1962, did you have anything to do with Centrex rates?

"A No, I did not.

"Q When you went on temporary assignment to AT&T, what were your duties starting in August 1962?

"A I was assigned as a rate representative on a special task force developing a new switched services offering. Later that became known as CCSA.

"Q Common Control Switching Arrangement?

"A Exactly.

"Q Can you briefly describe what CCSA is or was then?

"A Well, at that time I worked on it, we were attempting to develop a private switched network offering which would be attractive to large nationwide business customers. The network would involve various types of private line circuits which would interconnect various customer locations to centralized switching centers which would be used to further interconnect with other private line facilities of that particular customer.

"These would be dedicated network facilities for that customer's exclusive use.

wcr9 "Weber

"I said that I was on a developmental task force. The offering was not crystallized and completed during the time I worked on that assignment. The offering is now sometimes referred to as CCSA and may well vary in some respects from the very rudimentary description I gave and I am not familiar with the details of that network offering today.

"Q You said in January of 1963 that assignment was made permanent.

"Did your duties remain the same?

"A No, my duties changed materially.

"Q What were your duties starting in January of 1963?

"A In January of 1963, I beg your pardon. In 1963 my duties did remain the same. It was in August of '63 that they changed. I was on a temporary assignment from August to January, and joined the AT&T payroll on a permanent assignment but essentially the same assignment, namely that of working on this special task force.

"Q Yes?

"A From January '63 until August of '63.

"Q Now, tell us starting August '63 how your duties changed.

"A In August of '63 I became exchange rate supervisor. At that time, my responsibilities included primarily staff management responsibilities associated with basic exchange service offerings such as local business and residence service, rural services, hotel services, various types of compensation plans that we have such as for public telephone agents or hotels and, additionally, Centrex service.

"Q PBX service?

"A Not PBX service.

"Q You remained in that position of exchange rate supervisor up until there was a nominal change in your title in 1968, but your duties remained the same, do I understand it correctly?

"A My duties did change from time to time.

"Q Could you tell us how your duties changed over the years while you held that position of exchange rate supervisor and later marketing manager?

"A Yes, all right. I very briefly listed the duties that I had initially as exchange rate supervisor. There were others who had similar assignments to mine, perhaps with different titles also in the same division.

"In other words, people who also reported with me to a common boss; and during the period from '63 to 1971, there was an occasional shifting of responsibilities back and forth between the various groups in that organization generally for load balancing purposes.

"Perhaps the most significant change occurred in the first or second quarter of 1967 when my Centrex responsibilities were transferred to another group and at that time I took on responsibilities with mobile radio and interconnection with certain other types of communications carriers.

"Q Thereafter?

"A Thereafter, from early '67 to mid-'71, my duties were substantially unchanged in that assignment.

"Q Did you have anything to do from the first or second quarter of '67 through mid-1971 with Centrex service?

"A No, I did not.

"Q So your duties insofar as they embrace Centrex service, commenced in August of 1963 and ended sometime around the first or second quarter of 1967, is that correct?

"A Yes, it is.

"Q During that period, what was your title?

"A During the period when I had a responsibility for Centrex?

"Q Yes.

"A Initially my title was exchange rate supervisor and I believe that title was unchanged up until at least until the time I relinquished the Centrex responsibilities.

"It is entirely possible, I just don't recall, that the title was changed to marketing manager, but that was not a substantive change as far as my duties were concerned. It was only a recognition that the basic organization which I belonged to was transferred to another department within AT&T.

"Q What department were you in?

"A When I first joined AT&T?

"Q No, I am talking this period, August '63 through --

"A In August of '63 I was in the rate division of the planning department. My recollection is that it was coincident with a change in my title, marketing manager, that that whole functional organization was moved from what was known as the rate division into the market and service plans department --

"Q Still under --

"A -- where it remained until I left the organization in 1971.

"Since that time, there have been a number of realignments and even splits in the organization.

"Q From the period August 1963 through the first or second quarter of 1967, while you had responsibility or some responsibility for Centrex service, to whom did you report?

"A I reported to Mr. Fred C. Smith.

"Q To whom did he report?

"A He reported initially during that period to Hubert L. Kertz.

"Again, my recollection isn't entirely clear, but I believe that it was about 1965 that Mr. Kertz was replaced by Mr. Alston.

"Q Do you have his first name?

"A Angus, A-n-g-u-s A-l-s-t-o-n. He held that job for no more than eight or nine months when he was replaced by Mr. Ellinghaus.

"Q You have his first name?

"A William.

"Q What was Mr. Smith's title?

"A Rate administrator.

"Q And Messrs. Kertz, Alston and Ellinghaus while they held those positions?

"A Assistant vice president-rate division. Although toward the end of that period, the division name might have changed. I don't recall offhand.

"Q During this period 1963 to '67, did you have people reporting to you?

"A Yes, I did.

"Q How many?

"A It varied from four to ten people.

"Q Could you describe generally what their functions were during this period, '63 to '67?

"A Their general assignment was to work with the Bell operating companies in resolving problems that would be referred to them by the Bell operating companies; to assist the AT&T staff departments in the development of rates and tariffs for new service offerings which would be recommended to the Bell companies; to assist departments in evaluating rate and tariff implications of technical innovations that would affect the service offerings.

"Q During the period 1963 to 1967, were any of those people that reported to you assigned to work on Centrex matters?

"A Yes, sir.

"Q Can you name the ones that worked on Centrex matters?

"A The first --

"Q From 1963 to '67.

"A The first one that I recall was Mr. Howard Winter who was, in fact, working on Centrex matters at the time I took over the group in August of 1963. I believe he was the only one working on Centrex in the rate and tariff job.

"There was a succession of people during the ensuing years, and I cannot recall the exact time when they came in and left, but I do recall that, I believe, Mr. Winter was replaced by a Mr. Fordyce.

"Q Do you remember his first name?

"A Donald.

"Perhaps at a later time Mr. Scott Shepherd and Mr. Bill Doughty also worked on Centrex.

"I guess that is all I can recall at the moment.

"Q During that same period of time, 1963 through 1967, did you have, I think the right word is coordinates, in the operating companies, people that you talked to?

"A Yes, I did.

"Q What positions did those people hold in the operating companies?

"A The coordinates were, by my interpretation of that word, the same level as I was in the Bell System; that would be known as a division-level job. These were people who were on the corporate staff of each of the operating companies and were responsible for rate and tariff aspects of that company's services in that operating company.

"Q Your group or you made recommendations from time to time to them?

"A Yes, we did.

"Q You received inquiries from them?

"A Yes, we did.

"Q To which you responded?

"A Generally, yes.

"Q Let me show you a document which has been stamped" --

MR. STRUVE: Excuse me, Mr. Nickerson. Would you please read on page 19 from line 5 through line 16?

MR. NICKERSON: Yes, I should have.

"Q I am now talking, unless I otherwise indicate, of the period '63 through '67.

"Did you review in your group the tariffs which they proposed to file from time to time?

"A As a general matter, no, we did not.

"Q Did you ever review tariffs that the operating companies proposed to file?

"A Only in the sense that we might be called in to consult on a particular question they may have, they might have. In no sense did we review their tariffs as a matter of business procedure with the thought of approving or disapproving such tariffs."

Now skipping to line 25 of page 19:

"Q Let me show you a document which has been stamped 03313. It is a letter dated December 29, 1964 and purports to be signed by you.

"Is that your signature?

"A Yes, it is."

wc 1 "Weber

I would like your Honor to have that before you. I will introduce it in a moment.

"Q To whom did you send the text of that letter?

"A Well, in the context of the handwritten names at the top and 'Dear Hi,' H-i, this would have been sent to Southwestern Bell and in particular to a man known as Hi Boyles. He was Hi Boyles because he was a very tall long-legged individual.

"Q Did you send the same text to others in the operating companies?

"A Yes, I sent this text to a number of operating companies.

"Q How many?

"A I don't recall the exact number.

"Q Did you send a copy to each of the Bell operating companies?

"A I don't believe I sent it to every one.

"Q How did you determine which ones you would send it to and which ones you would not?

"Mr. Struve: If you recall.

"A The letter was sent, as I recall, to those Bell companies who had substantial, at that time substantial Centrex development or perhaps who had unusual situations as they might relate to the regulatory agencies with which they dealt.

"Some Bell companies at this point in time did not have extensive Centrex development and we felt it was not necessary to raise the question with them.

"Q How many had substantial Centrex development, round figures?

"A I introduced the word substantial. It is a very vague term. I would prefer to say that considering the total Centrex development in the country at that time, somewhere in the order of ten companies probably had the predominant part of that development in terms of numbers of customers and stations.

"Q You think you sent it to at least ten companies?

"A I can't say I sent it to at least ten, but as an order of magnitude, it might be close.

"Q Did you make a list of the companies to which you decided to send the letter?

"A I am sure I did at the time.

"Q Did you keep it?

"A I did not.

"Q What were the positions held by the people in the operating companies to whom you addressed the letter?

"A As near as I can recall, they were people at my level, my coordinates.

"Q What titles? What titles would that mean in the operating companies?

"A It would vary from company to company. In the New York Telephone Company, for example, it would be general rate engineer. In another company it might be rate manager and I am sure there were others.

"Q Each one was in the rate department, I take it?

"A Yes.

"Q Did you have anyone help you with the drafting of 03313?

"A I don't recall.

"Q Do you recall whether anyone contributed to the drafting at all?

"A It is highly likely that I consulted with Mr. Smith, rate administrator, before I sent it out.

"Q Do you recall that or are you just assuming that on the basis of your practice?

"A On the basis of practice. I don't recall any specific discussion I may have had with him.

"Q Do you recall his reviewing the letter before it went out?

"A No, I don't.

"Q Did someone suggest to you that you send out such a letter?

"A I don't recall the genesis of the letter. I don't recall the genesis of the letter in detail.

"Q Do you recall it in general?

"A Only that we apparently wanted some expression, informal though it might be, from the Bell operating companies as to how they perceived a possible change in Centrex rate structure.

"Q Do you remember talking to anyone about getting an expression of opinion from the operating companies?

"A The only discussion--I don't recall talking to anyone, although, as I mentioned earlier, it was general practice that a letter of this kind would be discussed with my boss and I am sure I discussed it with him at the time, but other than that, I don't recall."

Your Honor, I will offer that exhibit. I am going to ask the witness further questions about it.

MR. STRUVE: Your Honor, we have no objection to the receipt of Exhibit 79 in evidence, and there are similar documents relating to the same letter of December 29, 1964, as to the companies which prepared or received such documents. We do in the interest of completeness have one suggestion, and that is that there is one document among all that we produced that bears upon the reaction of the operating companies to the Weber wc 5 "Weber letter, which plaintiffs did not designate. We have designated it as Defendants' Exhibit K. We would suggest that they should come in at the same time.

MR. NICKERSON: I would agree with that, your Honor. I did not know about that one until they showed it to me the night before trial. But I wish they had showed it to me earlier. I could have used it.

THE COURT: Why don't you offer it. In fact, from what Mr. Nickerson said, he is prepared to offer both of them.

MR. NICKERSON: Yes. May I offer it in context, though?

THE COURT: Yes.

MR. NICKERSON: I will continue on, and I will offer this document when it comes in context.

Continuing on, then, with page 23, line 18 -- I think it would be well, your Honor, if your Honor has it, to glance at this letter, so that you will get the context of the questions.

Basically, what Mr. Weber is saying is that although they want to get the whole tax off, practical considerations suggest that they are going to have to be satisfied with something less. And so it has been felt they should push for eliminating the tax on competitive services. And he says that one difficulty with that approach is the Centrex package pricing. And one possible solution, he says, in the third paragraph, to this problem, which would not appear to compromise the packaging objectives, would be to charge for unrestricted Centrex stations on a two-component basis. That is the short paragraph in the middle of the page.

Then he explains that basis. The basis was to charge as the intercommunication component the amount which was charged for restricted Centrex service.

I think perhaps I should explain that to your Honor. It has been in the documents, but just to refresh your recollection. A restricted Centrex service, fully restricted Centrex service, had the capability only of intercommunicating. It did not have the capability of dialing out to the outside world. In other words, a customer might think that one of his employees did not need to call to the outside world. All he needed to do was to call up his fellows in the organization. And Mr. Weber is suggesting here that one way of making this split would be to charge as the intercommunicating portion, and therefore private communication part, the charge which was made for restricted Centrex, and leaving the balance of the charge as a taxable part of unrestricted Centrex.

"Weber

This, you will see, your Honor, was at the time that they were discussing, this letter was written long prior to the passage of the act, when they were discussing with Congress the Draft A, which you have seen, which is Exhibit 76.

With that context, your Honor, may I read from page 23, line 18.

(continued on next page)

MP "Weber

Now, continuing on page 23, at line 18:

"Q Let's take a look at the second sentence of 03313, which reads:

"'With this in mind, it has been felt that we should at least push for eliminating the tax on competitive business services.'

"Do you see that sentence?

"Q Yes, I do.

"Q Do you recall who it was that had such feelings?

"A This reference to 'we should at least push' was merely a reference to AT&T's general position at that time. I don't associate it with any specific individuals.

"Q Were you a member of any group that was looking into the possibility of amending the federal excise tax in 1963?

"A There were a number of people from several departments who were looking into this, and I participated informally in a number of meetings they held. I did not consider it a formal group or committee as such. It was a series of meetings that were held as might be held on any particular business problem that might come up.

"Q But you do recall those meetings?

"A Oh, I do, yes.

"Q And you recall talking, for example, to Mr. Ferrall?

"A Yes.

"Q And Mr. Fuller?

"A Yes.

"Q Others?

"A Yes, I believe there was a Mr. Charvat, also an attorney; there was a Mr. Erickson, who I think was in the accounting department. I think a gentleman by the name of Burroughs, who worked for him at the time.

"Those are the names that come to mind immediately.

"Q And those meetings where you concluded or learned that AT&T should push for eliminating the tax on competitive services?

"A It was my impression from attending those meetings that that was the AT&T position.

"Q I take it from what you are saying that you don't have any independent recollection of the discussions that took place at those meetings?

"A I don't recall the discussions in detail, although I do recall attending such meetings --

"Q Can you tell --

"A -- with those individuals present.

"Q Yes, I realize it is a few years ago, but see if you can recall, if you would, the substance of those discussions.

"Weber

"A The discussions, as I understand it and as I recollect it, evolved from a concern held by the Bell System and by AT&T for some time over what it considered the unfairness of what was known as the federal excise tax on telephone communication service, ten percent, I believe, which had been in effect for quite a number of years.

"It was a wartime tax that had been continued. We felt that that was an unreasonable burden for telephone customers to have to pay and I understood that we had pressed for some time to get that tax law repealed or modified in some way which would relieve our customers of that burden.

"In the period that you cite here, just prior, I assume to this memorandum or this letter, the ten percent tax was still in effect. However, I recollect that it was scheduled for reduction very shortly after this time. I think it was scheduled to go down to three percent or something like that.

"Of course, subsequent events proved different. Congress enacted additional legislation which, in effect, reimposed the full ten per cent on a year-to-year basis.

"Ultimately in more recent years as we all know, there has been a gradual reduction in that tax. But our position, again going back to the '64 period, was that the tax was unreasonable and that we would continue to endeavor to have Congress modify the tax law to eliminate that tax.

"Q Have you looked at the text of 03313 recently?

"A Only with Mr. Struve. I hadn't looked at it in years.

"Q How recently have you looked at it?

"A I would say within the past week.

"Q Take a look if you would, Mr. Weber, at the first sentence, and read it to yourself, if you would.

"You make reference in that sentence to 'practical considerations.'

"Can you tell us what those practical considerations were?

"A Yes. It was my understanding that this tax revenue was very substantial and to remove it at one time without some replacement would create a very substantial budgetary problem for the federal government.

"Q If you would please now direct your attention to the second paragraph and read it to yourself, if you would, please.

"A Yes.

"Q Do you recall having conversations with respect to the difficulty which you refer to in that paragraph?

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"A Yes, I do.

"Q When was the first of those conversations?

"A I don't recall precisely. It would very likely have been during 1963.

"Q Do you remember how many conversations you had on that subject?

"A No, I don't.

"Q Can you tell us with whom those conversations were?

"A The individuals I mentioned earlier were certainly involved in those discussions as was my boss, Mr. Smith.

"Q Can you recall what was said in the conversations?

"A At the time I joined the discussions, whenever that was, apparently there were some tentative plans tha had been formulated to proceed with efforts to have the tax laws restructured so as to have the excise tax apply only on certain services, not on all communication services.

"I think a very loose breakdown or a loose description of that split in tax liability is described in the latter part of the first paragraph.

"The discussion of Centrex, of course, came up because of the reasons stated in the second paragraph.

"Q Had a draft of proposed legislation been prepared, if you recall, by the time you wrote this letter, December 29, 1964?

"Weber

"A I belive there had been some drafts prepared.

"Q Would you read over to yourself the third and fourth paragraphs.

"Haveyou now read those paragraphs?

"A I have.

"Q You refer in the third paragraph to one possible solution to this problem.

"Did you consider other solutions prior to December 29, 1964?

"A Yes, there had been a couple of other possibilities considered. I recall one in particular suggesting that perhaps one possibility might be to arbitrarily apportion the application of a tax through some accounting activity at the time of the billing of a customer's charges such that the tax would only apply on some percentage of the total charge, not 100 percent. That is one that I specifically recall.

"I can't say there weren't others, but that is one I do recall.

"Q You don't recall any others?

"A One approach -- I don't recall the specific consideration of other plans. I do recall that one. I think there are other ways to do it, obviously, but my own personal recollection is that this was one approach as stated in this memorandum.

"Another was some arbitrary allocation in the billing process.

"Q Who suggested the possibility of an arbitrary allocation in the billing process?

"A I don't recall.

"Q Do you recall any discussions of that suggestion?

"A Yes, I do.

°Q With whom?

"A The group I had mentioned earlier when all the individuals were there.

"Q Which group?

"A Particularly those would be probably Mr. Erickson, Mr. Burroughs, Mr. Charvat, certainly that group.

"Q Mr. Ferrall?

"A I don't recall specifically discussing it with him.

"Q Can you remember those discussions on this subject?

"A I think there was a reluctance to proceed with this allocation approach because of legal considerations with respect to the application of a tax on something that would be other than a stated tariff charge.

"Q Do you recall what those legal considerations were that were stated?

"A I believe the consideration --

"MR. STRUVE: Before you answer you should make clear on the record that Mr. Weber is not a lawyer, so that any answer he gives as to what he recalls as to legal considerations that might have been expressed has got to be read with recognition that Mr. Weber himself is not a lawyer.

"MR. NICKERSON: I am just asking what was said to him to the extent he recalls.

"Would you read the answer so far and perhaps then you can continue it.

"A I believe the consideration had to do with the application of a tax to a charge that would be explicitly stated in our tariff. It is my recollection that the accounting people who considered this alternative felt that it would be lawful only to apply a tax on a filed tariff charge explicitly stated and that to apply a tax on only a portion of such charge which might be arbitrarily arrived at and not actually stated in the tariff, might be construed as unlawful.

"Q Did I understand you to say that the accounting people?

"A Accounting and our tax attorneys, the people I mentioned before.

"Q Can you recall which division, department, section it was that advanced this suggestion in the first place?

"No, I don't.

"Q You don't recall the individual who advanced it?

"A No, I don't.

"Q Do you recall the individual or individuals who mentioned the legal considerations which you have just testified to?

"A That would have been Mr. Charvat, I believe, but I don't recall specifically his words.

"Q But you do recall that it was Mr. Charvat?

"A Mr. Charvat was actively involved in this project. I have to assume that it was he who made that observation.

"Q You are assuming that, you have no independent recollection of it, am I correct?

"A I have no independent recollection of it.

"Q If you will read the last two paragraphs of the letter, Mr. Weber, I will ask you a question or two.

"A All right.

"Q Before I do, Mr. Oberman reminds me to ask you another question about the suggestion of an arbitrary apportionment of the charge.

"Did you make any comments on that suggestion that you recall?

"A I don't recall making any.

"Q Have you read the last two paragraphs of 03313?

"A Yes.

"Q Am I correct in understanding from those paragraphs that you knew by December 29, 1964 that representatives of AT&T had been talking with the IRS and congressional committees about the federal excise tax?

"A There had been discussions in Washington, yes.

"Q You knew that?

"A Yes, I did.

"Q In December of 1964.

"What had you been told up to that point about those discussions and communications with IRS and the congressional committees?

"A I was aware of the general approach that we were recommending through drafts that we had prepared for a change in this law.

"I was aware that the federal government was concerned about the revenue impact of such prospective changes if they were to be enacted. I believe the draft had been discussed informally in some detail with staff members of the congressional committee, and that in more detailed discussions, questions of implementation had arisen,

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and the matter of Centrex had been specifically raised.

"Q Do you recall how it was that you learned in 1964 of the facts you just testified to?

"A I don't recall the individual. It came from the group that I mentioned before.

"Q Did anyone in that group suggest that the operating companies should be contacted with respect to their attitude, with respect to the tax on Centrex?

"A I don't recall that they did, no.

"Q Do you recall who suggested the possible solution which is contained in the third and fourth paragraphs of 03313?

"A I don't recall exactly. I must assume that it was an approach that was developed jointly perhaps by myself, a gentleman working for me at the time, perhaps by Mr. Smith, but I don't recall in detail that any one of them contributed specifically to the idea or that any one contributed more than another.

"Q Did anyone, prior to December 29, 1964, suggest to you that the solution which is mentioned in the third and fourth paragraphs of 03313 would not be a fair one?

"A I think the possible solution that was described in this memorandum was presented initially to the Bell Company people they sent it to for consideration as a way to implement

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such a breakdown, a possible way to implement a breakdown of the rate.

"When you say not a fair one, I guess I don't understand what you mean by that.

"Q Let me rephrase it. If you don't understand any of my questions, Mr. Weber, would you so indicate to me?

"A Certainly.

"Q And I will try and rephrase them so they are understandable.

"Did anyone, prior to December 29, 1964, suggest to you that the possible solution which is referred to in the third and fourth paragraphs of 03313 would not fairly reflect the proportion of the cost of Centrex service that was represented by intercommunication?

"A I don't believe there was such an evaluation made as to a fair apportionment, was that your word?

"Q Yes, proportion.

"A Yes.

"Q Did you focus on the problem in 1964 of whether the solution which you referred to in this letter would fairly reflect the proportion of cost which was represented by intercommunication?

"A The proposal described in this memorandum or letter was only indirectly related to cost. It was an

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approach that was designed to accomplish some split in the Centrex rate using existing rate elements that were then filed in the tariffs, an approach which would avoid detailed cost studies as such.

"Q Do I understand, then, that you did not focus in December of 1964 on the question of cost?

"MR. STRUVE: I object on the ground that the question is not a fair characterization of the previous testimony.

"Q Would you answer the question, please?

"A Since Centrex rates filed in the Bell companies were and are indirectly related to costs, among other things, a split which was related to these rate elements would naturally include an indirect recognition of cost. Centrex unrestricted station rates were supported when they were filed on the basis of cost as well as other considerations. Similarly, restricted station rates were filed with supporting cost data among other pricing and rate considerations.

"To the extent that a portion of the unrestricted rate was related to the restricted station service, there is an indirect recognition of cost, but beyond that it is arbitrary.

"Q Let me try once more.

"Did you have any discussions in 1964 at all as to whether a solution which you set forth in the third and fourth paragraphs of 03313 was a fair split between intercommunications and exchange access, Centrex service?

"A I don't recall.

"Q Do you recall focusing on that question of whether it was a fair split?

"A To the extent that I described the basis for the proposal in the fourth paragraph of this memorandum, we focused on it. The rationale for supporting that approach, yes.

"Q What were the criteria that you used in making a judgment as to whether or not that was a fair split?

"A I didn't say we made a judgment as to whether it was a fair split in those terms, I don't believe.

"Q Did you not make that judgment?

"A I don't think I said the question of fair split in those terms came up. The alternative of splitting Centrex charges described here was one which we described as a possible approach the Bell operating companies might use if it were to come to the matter of having to do something.

"The question of whether or not this was a fair split, to use your terminology, was considered only within the context of the rationale I have set forth in the fourth paragraph here.

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"Q You are familiar with the fact that in 1971 and 1972 there was a separation of Centrex charges, are you not?

"A I have been told that there was.

"Q Do you know on what basis that separation was made?

"A I understand from discussions with Mr. Struve just recently that the basic approach taken at that time was to take out of the Centrex rate the equivalent portion of that charge associated with central office trunks, essentially that, in very simple terms.

"Q Did you consider that approach in 1964?

"A I don't recall that we did.

"Q Do you recall that you did not?

"A I do not.

"Q Prior to December 29, 1964, do you know whether anyone else in AT&T had communicated with the operating companies on the subject of whether unrestricted Centrex rates should be separated?

"A I have no specific knowledge of other communications.

"Q In the period subsequent to the date of this letter, 03313, through June 21, 1965, do you know whether there were any meetings attended by people from AT&T and people from the operating companies concerning the possible

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separation of Centrex, unrestricted Centrex rates?

"A I don't know the specific reference to that latest date that you mentioned. I know there were subsequent meetings, but I don't know the date.

"Q Let me identify the date. I believe that was a date when the Excise Tax Reduction Act of 1965 was passed and my question was whether there were any meetings at which AT&T personnel and operating company personnel were present where the separation of Centrex rate was discussed.

"A Discussed with whom?

"Q In such meetings.

"A Meetings with the IRS? Meetings with whom?

"Q Any meetings at which AT&T and the operating company personnel were present.

"A I don't recall that -- I just don't recall meetings of that nature subsequent to the date of this letter.

"Q By the date of this letter, had you seen any drafts which had been prepared by AT&T with respect to federal excise tax?

"A I am aware that such drafts were in existence. I don't recall seeing complete drafts, although, I do recall seeing portions of drafts.

"Q Can you recall discussions about those drafts?

"A I recall discussions of the drafts as they related to the selection of words and phrases that would go into such legislation.

"Q Can you recall what was said?

"A General discussion on the subject. I don't recall any specific statements by individuals.

"Q Can you recall the substance of the discussions which you attended?

"A The substance of the discussions, this is the period prior to December '64, related to the drafting of this proposed legislation which is described in very general terms in the first paragraph of this memorandum. Everything associated with that concept I am sure was discussed in those meetings.

"Q Do you recall anything else of those discussions?

"A The discussions were primarily concerned with developing a clear definition of what would be taxable and what would not be taxable with respect to all services the Bell operating companies offered.

"Q Do you recall what was said on that subject?

"A I am afraid I don't understand the thrust of your question.

"Q I am trying to get the best of your recollection of this discussions of what was said. You said you can't remember specifically what one person said, which is

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understandable. It is a few years ago, and I am asking you what you do recall about those.

"A Certainly the discussions considered this general question of how the draft would be worded such as to distinguish between types of services that would be taxable and those that would not be taxable.

"Within the context of those discussions, there were individual services, in particular, Centrex, where it was recommended that the nature of the service and the way it was packaged from a rate standpoint would include some types of service which we clearly had accepted as being taxable and other services which were non-taxable provided in other ways. For example, PBX service.

"Q Was there discussions in those meetings which you say you recall attending of how to handle the Centrex problem with respect to the federal excise tax?

"A Yes, there was.

"Q What was the substance of those?

"A The substance of the discussions early on was to explore whether or not there would be some way to make only a portion of that Centrex unrestricted station rate taxable.

"Later the discussions evolved to a point where it was concluded that there was not a simple way to accomplish that, one that we would want to recommend.

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"Q Do you recall anything else on that subject of Centrex and how to deal with it?

"A Only -- in the sense that at some point at this time, late 1964, there was a growing consensus that Centrex probably would have to remain as a taxable service at least as far as unrestricted stations were concerned.

"Q That was a consensus among the group that you have mentioned?

"A Yes.

"Q Mr. Ferrall, Mr. Charvat?

"A Yes.

"Q Let's take a look at the third paragraph of this 03313 and in particular to the words 'our packaging objectives.

"Do you see that sentence?

"A I do.

"Q Can you tell us what 'our packaging objectives' refers to?

"A Those words refer to the offering of Centrex service under rates which would contemplate providing to the customer a variety of associated services or service arrangements but would do so under a single rate element rather than by building up that same, call it a package of service arrangement, through a number of different rate elements. One package would be provided at one rate rather than that same quantity of services in the package being provided under a number of different rates, different places.

"Q Have you finished?

"A I have.

"Q What were the objectives of packaging the rate, as you understood them?

"A The packaging objective was designed to simplify the offering of the service, simplify the purchasing of the service by the customer, an approach which would permit him to relate his total communication requirements simply to the number of stations that he required so that he wouldn't have to get into extensive negotiations with the company, or discussions with the Telephone Company relating to the method of providing the service or the great host of hardware components that might be involved in providing the service as had been the case historically for example, with PBX service.

"Q Are those the only packaging objectives that you had reference to in this letter?

"A Essentially, yes.

"Q Could you explain to us why the possible solution which you refer to in the third and fourth paragraphs of 03313 would not compromise those packaging objectives?

"A Certainly. Centrex had been filed by most of the

Bell operating companies at that time on the basis of a single monthly charge for an unrestricted Centrex station, a different charge for a restricted station and perhaps another charge for an attendant console which is a third element.

"So what we had essentially then were three service and rate components which were tied directly together and by specifying the particular number of stations that he wanted unrestricted and the number of stations that he wanted restricted, the customer would simply tell the Telephone Company salesmen that minimum amount of information and the service would be provided without the need to get into a lot of detailed discussion on hardware.

"When I said that we would not compromise that approach, it was simply a reflection that this possible solution retained those same rate components. It simply hypothetically looked upon the unrestricted station rate as being a rate which contemplated, in fact, both network calling as well as intercommunication.

"Since we had a rate for intercommunication only, it was felt that well, might it not be possible to split out the equivalent of that restricted station charge from the unrestricted station charge and whatever is left over, then would be looked at as the Centrex line charge.

"We haven't disturbed the number of rate elements, they remain the same. We have simply rearranged them slightly.

"Q Did you have any discussions up to December 29, 1964 as to whether some other method of separating the Centrex rates would compromise the packaging objectives?

"A I don't recall specific discussions, but any effort to get into a detailed breakdown of those charges which would produce a different number of, or more, rate components, based on considerations not present in the original rate recommendations, would certainly do just that.

"Q Taking the method which you have already mentioned which was eventually used to separate the Centrex rates in 1971 and 1972.

"Would that method compromise the packaging objectives?

"A I am not thoroughly familiar with the details of how that was accomplished. My understanding from the very brief reading of that rate recommendation, a letter provided to me by Mr. Struve, was that the unrestricted station rate was modified by withdrawing from that rate some components related to trunk charges, not by modifying the rate by subtracting out another rate as was the case here.

"In removing trunk charges, that required a reconsideration of the entire cost justification perhaps for the Centrex offering and raised very serious questions as to whether or not it would be appropriate to move before the various state commissions with such a restructuring so soon after the original Centrex offering had been filed and accepted by those commissions.

"Q By 'so soon' --

"MR. STRUVE: For the record, I believe I should say that the letter which Mr. Weber has referred to as being furnished by me to him was a copy of the September 1971 general letter of AT&T."

That will become Exhibit 200, your Honor, which we will come to.

Then he asked, "Can we take a break?"

And I said, "Before we do that, let me put before Mr. Weber document 00150 and ask if that is the document that you and Mr. Struve have referred to.

"THE WITNESS: Yes, this is the letter."

And that is Exhibit 200, your Honor, which you will see in due course.

"MR. NICKERSON: Let me ask just one or two questions.

"MR. STRUVE: I should state that since you asked whether it was the document that Mr. Struve referred to as well as whether it was the document the witness referred to, I was referring to a different copy of the same general letter.

"I think the record should also --

"MR. NICKERSON: Have a different stamp number at the top?

"MR. STRUVE: The stamps were from 00150 to 00164.

"BY MR. NICKERSON:

"Q Let me ask one or two questions more to finish this subject before we take a break.

"Mr. Weber, that wouldn't make any difference to the customer, would it, how the split was made? It wouldn't be any more convenient to the customer, no matter how the split was made, would it?

"MR. STRUVE: Objection on the ground of argumentativeness and speculativeness.

"Q Would you answer that?

"A There was a very real possibility that such a chang which, in effect, tore into the very basis of the rate itself, might result in a re-evaluation of that rate by a state commisssion which could result in a rare increase.

"Q Was there any discussion prior to December 29, 1964 about the possibility of the regulatory agencies questioning the Centrex rates?

"A Yes, there was.

"Q When was the first discussion on that subject in

1964?

"A I don't know the date.

"Q With whom?

"A In considering the possibility of a Centrex split within the rate organization, Mr. Smith and myself, very likely the fellow who worked for me at the time, I don't recall who that was offhand.

"Q Was it Mr. Shepherd, maybe?

"A It could have been, but I don't know for a fact in 1964 whether it was.

"Q Yes?

"A We were all concerned that reopening by the Bell companies of Centrex tariffs or any restructuring of charges was probably not a desirable thing to do.

"The initial recommendations sent out to the Bell companies for Centrex were sent in mid-1961, as I recall, and it had taken the companies quite some time before they were even prepared to file their own Centrex offerings and the respective state tariffs and in some cases, perhaps in most case, I don't recall, the approval of those Centrex tariffs was delayed for significant periods of time while the companies introduced cost marketing and other testimony in support of those tariffs.

"It is my recollection that toward the end of '64 there were still some Bell companies that had not even then secured approval for their Centrex offerings.

"Concern was that having so recently within the past year or two, for example, gone into very extensive discussions of Centrex pricing philosophy, Centrex rate support before those state commissions, that the Bell companies would probably not find those commissions receptive to such an early change in those tariffs.

"Q Why wouldn't they be receptive?

"A Any change in a tariff naturally has its impact on customers, particularly if the service is a going service. As customers have their rates changed and their charges are changed, naturally they raise questions which the commission hopes it could avoid. It hopes it can avoid increase for some customers, increases that might be viewed by some customers as being unreasonable for whatever reason that customer might have.

"Q If there were no overall increase in the Centrex rates, the customers wouldn't have any objection, would they?

"A There were other considerations, such as the relationship of Centrex rates to, for example, PBX rates, and a great part of the Centrex filing effort had been to support the differences in charge for Centrex service and PBX service and relate those differences to differences in the services themselves.

"Any change in the way the Centrex rates would be applied, even this example I cite here, might well result in different relationships to comparable PBX offerings then in effect which could produce either desirable or undesirable comparisons."

THE COURT: I think we will take our luncheon recess and we will resume at ten minutes after 2.

(Luncheon recess.)

wcr1

AFTERNOON SESSION
2:10 p.m.

THE COURT: Proceed.

MR. NICKERSON: I believe we had ended with line 7, page 59, of Mr. Weber's deposition, which I would now like to pick up on line 8, that same page:

"Q Thank you.

"Now, did you receive responses to your letter of December 29, 1964?"

THE COURT: Is that where we left off? I think you have got the wrong page. You left off at 51.

MR. NICKERSON: Excuse me, your Honor, you are quite right. 51, line 4:

"Q Explain to us, if you would, why that is so" --

I think we had better get the connection of it by reading the previous question and answer. Page 50, line 14:

"Q If there were no overall increase in the Centrex rates, the customers wouldn't have any objection, would they?

"A There were other considerations, such as the relationship of Centrex rates to, for example, PBX

"Weber

rates, and a great part of the Centrex filing effort had been to support the differences in charges for Centrex service and PBX service and relate those differences to differences in the services themselves. Any change in the way the Centrex rates would be applied, even this example I cite here, might well result in different relationships to comparable PBX offerings then in effect, which could produce either desirable or undesirable comparisons.

"Q Explain to us, if you would, why that is so and assuming for the moment that there is no change in the total charge for Centrex, but simply a separation of the charge between intercommunication and exchange access.

"Mr. Struve: Objection on the ground that I believe the witness has already explained that.

"Q Would you answer the question, please.

"Mr. Struve: Further objection on the ground that the question is argumentative.

"The witness has given his explanation and now, with respect, Mr. Nickerson, you are trying to argue with the witness.

"Q Would you answer the question, please.

"A Would you repeat the question.

"(Record read)

"A If that were, in fact, the result the customer might have, an individual Centrex customer, might have a little concern; however, I think it is presumptuous.

"Q Excuse me, I didn't hear you. Might have what?

"A If the basis of the -- let me go back.

"Would you repeat the question once more, please. I want to make a point and I want to try to relate it to the words that you included in your question.

"(Record read)

"A From the viewpoint of the Centrex customer, if your assumption were correct, that those total charges would not change, the Centrex customer probably would not object. However, I feel that the assumption is unjustified because any time the company goes into changing a tariff, it opens up the whole question of whether those rates prospectively are fair and reasonable and while the rates in effect at any given point in time may have had past approval, subsequent events, changes in cost, changes in commission personnel, questions raised by customers, any of a variety of reasons, might result in those rates being changed and be different from what the company originally might propose.

"Weber

"Q Were you concerned that customers, if the whole matter were reopened again, then would possibly object to the amount of the Centrex rates as being unjust and unreasonable?

"A The reopening of the Centrex rates as a result of the proposed change such as this, would certainly permit any customer for whatever reason, even though unrelated to this problem here, to come forward and challenge the whole gamut of Centrex rates.

"Again, as I stated before, as Mr. Struve pointed out, we had just been through an exhaustive period of supporting those rates before commissions and finally had them approved and it was the view of those considering this matter, that it would be undesirable to reopen this whole question of Centrex rates so soon after they had become effective.

"Q The people that considered it included yourself, Mr. Smith and whoever it was that was in your group working on Centrex?

"A And whoever Mr. Smith may have consulted with.

"Q Do you know who that was?

"A I can only assume he may have discussed this with his own boss.

"Q Who was that? Was that Mr. Kertz?

"A Very likely.

"Q Yes?

"A I know -- I don't know, rather, that from personal recollection, but I can assume that Mr. Smith would very likely consult on a question of this nature with him.

"Q You mentioned various things" --

MR. STRUVE: Excuse me, Mr. Nickerson.

Your Honor, I move to strike the answer beginning at line 14 and ending at line 21 on the same ground that it is stipulated Mr. Kertz was not in the rate area and therefore was not the person with whom Mr. Smith would have --

THE COURT: This is only the witness' testimony. It goes to the credibility. I will accept your statement. I don't see how that makes it a basis for objection.

MR. STRUVE: Simply that he was not testifying about --

THE COURT: Won't you give me enough credit to discount a man's statement, when he says he is assuming, that it is not a matter of substance that he is relying upon? I state that for the record. The man states he assumes; he doesn't know.

MR. STRUVE: Thank you, your Honor.

BY MR. NICKERSON:

"Q You mentioned various things that were done in connection with the establishment of the Centrex rates by the various companies.

"Were you personally familiar with those things that were done by the operating companies to establish the Centrex rates?

"A What do you mean by 'personally familiar'?

"Q Did they report to you what they had done. How did you know what their problems were in establishing the Centrex rates?

"A We were generally aware of when a company had filed its rate application and we generally were aware of what was happening in a particular state or jurisdiction with respect to the consideration of that tariff by the state commission, for example, whether it was awaiting formal hearing, whether there were going to be witnesses, cost data introduced, things of that kind, before approval might take place.

"Finally, we were kept aware of when those tariffs became effective."

Now skipping to page 56, line --

THE COURT: Now, before you go on, I have a question to ask. The witness made a reference to a recent filing of Centrex rates. Is there anything in the evidence already presented or that will be presented as to when the Centrex rates had been filed?

MR. NICKERSON: Yes.

THE COURT: That is, tariffs had been filed with various state regulatory commissions before December 1964.

MR. NICKERSON: Yes, your Honor. The filing--

THE COURT: If it is agreed upon, it may be just as well to put it in here.

MR. NICKERSON: It is in the stipulation, your Honor, and it is already before your Honor, in attachment B to the stipulation of facts.

THE COURT: That answers the question.

MR. NICKERSON: Now skipping to page 56, line 14:

"Q By December 29, 1964, had any customers filed objections to Centrex rates?

"A Many customers filed objections at the time the tariffs were filed, and those customers intervened in subsequent hearings before the respective commissions.

"Q Many customers filed objections, did you say, at the time of the original filings?

"A Either at the time of the original filings or in the period immediately after they became effective.

"Q Do you recall the names of any of those customers?

"A One in particular I recall was the GSA, federal government.

"Q Where did they file, in New York?

"A I know they filed in New York. They filed in other locations. I can't give you a specific list, though.

"Q How many customers actually filed objections at the time of the filing of the Centrex rates?

"A I can't give you a number. I may have used the word objections. There certainly were a number of customers or prospective customers who intervened as a matter of their own interest in the hearings that were held pursuant to those filings."

Now skipping over to page 58, line 10:

"Q Would this possible solution which is referred to in your letter of December 29, 1964 stamped 03313" -- that is Exhibit 79 now -- "have raised the possibility of trouble with the regulatory agencies?

"Mr. Struve: Objection.

"That question has been asked and answered at least twice and I believe more times.

"Mr. Nickerson: I don't believe so.

"Q Would you answer the question, please.

"A It was felt --

"Mr. Struve: I renew my objection on the ground that the witness has already answered that question several times and with greatest respect, Mr. Nickerson, you are simply trying to argue with what the witness has told you.

"Q Would you answer the question, please.

"A It was felt that -- would you repeat the question.

"(Record read)

"A It was felt that any filing which would modify in any way existing Centrex rates might lead to questions by state regulatory commissions and perhaps more pervasive investigation into overall Centrex rates.

"Q Thank you.

"Now, did you receive responses to your letter of Decemb er 29, 1964?

"A I recollect having received a number of telephone calls.

"Q Did you receive any written replies?

"A I don't recall any written replies.

"Q How many telephone replies did you get?

"A I don't know the exact number.

"Q In substance, how many?

"A Not more than the number of letters I sent out and possibly less. As I said earlier, I don't know the exact number of letters sent out so I can't be more specific than that.

"Q Maybe half a dozen to ten?

"A Possibly.

"Q Okay.

"Did anyone else other than yourself receive telephone replies?

"A I don't know."

Now, skipping to line 18 of page 60:

"Q Can you tell us any companies from whom you did receive a telephone reply?

"Mr. Struve: Did you say from whom you did or from whom you did not?

"Mr. Nickerson: From whom you did.

"A I can't specifically say which ones I did receive calls from, which ones I didn't.

"Q You can't -- you have no recollection?

"A I do not recall any specific such telephone response.

"Q Okay.

"Can you recall in general what the responses were?

"A Yes.

"Q Could you tell us that?

"A The general response was that the companies foresaw considerable difficulties in implementing such a proposal for a variety of reasons and that they would prefer not to go forward with it if it were not absolutely necessary.

"Q Did any of them say that they would go along with it?

"A I don't recall any saying they would go along with it without any qualification of some kind.

"Q Did any say they would go along with it with qualification?

"A The decision the individual company might make to go along with it as you express it would involve the same evaluations that were made at AT&T regarding the pros and cons of doing it.

"Obviously, if we were under court order to do it, we would have done it, but that is not to say that the disadvantages from our viewpoint might not outweigh what others might construe as advantages.

"Q Did you discuss with them the various advantages and disadvantages in your telephone conversations when they replied to you?

"A I don't recall.

"Q Do you recall in general terms whether they in general agreed with the disadvantages which you have already testified to?

"A I don't recall the discussion relating to specific advantages and disadvantages, so I couldn't characterize anything they said as agreeing or disagreeing with that. They certainly --

"Q Did they have the same attitude? Can you recall their attitude with respect to what the advantages or disadvantages were?

"A Their attitude was that a step such as this involved disadvantages which in their view far outweighed any advantage.

"Q And, in substance, were those the same kind of disadvantages that you have already testified to?

"A Yes.

"Q Let me show you three documents which are stamped 15756, 15757 and 15754-15755. I will put those in front of you, if I may. 15754-15755, the body of that letter is the same, I believe, as 03313."

That is Exhibit 79."The memorandum stamped 15756 and 15757"—your Honor, are now respectively Exhibits 81 and 82, which I am about to offer -- "comes, I believe and am informed, from the files of Pacific Northwest Bell.

"Do those papers refresh your recollection with respect to any conversations with anyone in Pacific Northwest Bell on or about the date of January 1965?

"A I don't disagree with the conversation that they reflect, however, I don't specifically recall that conversation.

"Q You have no independent recollection?

"A No, I do not.

"Q By the way, who is the Bob referred to on 15754?

"A Assuming as you say that this did come from the files of the Pacific Northwest Bell Company, this very likely would have been Robert Kroll. K-r-o-l-l."

Now, your Honor, I offer Exhibits 81 and 82, which come from the files of Pacific Northwest Bell and I think speak for themselves.

I think I might point out, on the bottom of Exhibit 82 the sentence saying "I covered the above with Scott Shepherd at 195" -- 195 means AT&T headquarters -- "this morning."

And I gather Mr. Struve has no objection to those.

MR. STRUVE: We have no objection to their receipt as to Pacific Northwest Bell.

THE COURT: All right.

(Plaintiffs' Exhibits 81 and 82 were received in evidence)

MR. NICKERSON: Now I offer Exhibit 80, your Honor. That comes from the files of Illinois Bell, and again it speaks for itself.

THE COURT: All right.

MR. NICKERSON: Now, your Honor, I offer --

MR. STRUVE: We have no objection to the receipt of Exhibit 80 as to Illinois Bell. I should note that Exhibit 80 does not state and there is no other evidence that the views stated in Exhibit 80 were in fact communicated to Mr. Weber or anyone else at AT&T.

MR. NICKERSON: Your Honor, I now offer Exhibit 83, which comes from the files --

(Plaintiffs' Exhibit 80 was received in evidence)

THE COURT: Before you go ahead, is it clear who Mr. Trout is?

MR. NICKERSON: Yes, your Honor, it is in the stipulation as to documents. Mr. Trout is an assistant vice president of Illinois Bell, and Mr. Stang, who signs it, is the general rate engineer of Illinois Bell.

All of these documents refer in turn to the stipulation of documents and it identifies the people.

THE COURT: It would be helpful to put it right in the record.

MR. NICKERSON: All right, your Honor, I will.

Now I offer Exhibit 83, your Honor, which is a memorandum dated February 3rd, and was sent by W. G. Butler, the general staff superintendent of C&P Company, to Richard DeButts, assistant vice president for revenue requirements of C&P, and it is stipulated in that paragraph, 83 of the stipulation as to documents, that the handwriting on the memorandum up at the upper right reads: "Thanks very much. I reviewed our comments with Mr. Weber today, 2-9-65."

And it is stipulated that that handwriting is the handwriting of Mr. DeButts.

THE COURT: What were you reading from just now?

MR. NICKERSON: I was reading from the stipulation --

THE COURT: That is the portion on top of the exhibit?

MR. NICKERSON: It may not be too legible on your copy, but it is in the stipulation as to documents.

(Plaintiffs' Exhibit 83 was received in evidence)

MR. NICKERSON: Now, your Honor, I have the document which Mr. Struve supplied me the night before trial, Defendants' Exhibit K, and I don't know the identity of the people -- of the person who wrote this memorandum, your Honor. Perhaps Mr. Struve can enlighten us. But it comes apparently from the files of Ohio Bell.

MR. STRUVE: I should mention, in light of Mr. Nickerson's second mention of my having supplied this yesterday, that the number stamped on this document indicates it was supplied more than a year ago as part of Ohio Bell's initial document submission in this case.

MR. NICKERSON: I may say, your Honor, it was not one of the documents that they reserved the right to introduce. If it had been I would have focused on it.

MR. STRUVE: The document was written by Theodore E. Rigby, who was the rate manager for Centrex of Ohio Bell. The Mr. Soeder referred to in the first paragraph was Leonard H. Soeder, the District Rate Manager-Tariff Filings, of Ohio Bell, and his responsibility lay in the area of actually implementing the filing of revised tariffs with the Ohio Commission.

I should state that we have no objection to the receipt of Exhibit K as to Ohio Bell, and that once again for clarification there is no evidence that these specific views were transmitted to Mr. Weber, but they certainly do obviously represent the view of one of the Ohio Bell's people who carefully considered the proposal.

MR. NICKERSON: I will accept Mr. Struve's statement of the offices occupied by the individuals.

2 p.m.

(Pause.)

MR. NICKERSON: May I continue, your Honor?

THE COURT: Yes.

MR. NICKERSON: Continuing on with Mr. Weber's deposition at line 17, page 66:

"Q After you received the responses from the operating companies, did you inform anyone of what they had said?

"A I have no specific recollection of any conversation or memorandum of that sort that I wrote.

"However, since I have a general recollection that the decision to solicit the views of the companies on the subject was discussed with Mr. Smith, I also have to assume that the consensus of those views expressed to me was also discussed with him.

"Q After your discussion with Mr. Smith, was any decision made as to whether AT&T would or would not recommend that Centrex rates not be separated?

"A My recollection is that the views of the companies expressed to me sustained the view that AT&T had arrived at independently prior to the writing of that series of letters.

"Q When did AT&T arrive at that view?

"A Probably prior to the issuance of these letters, shortly before that.

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"Q Who was it in AT&T that had arrived at that view?

"A Again, I have to assume since I had no specific recollection of any discussion, that it was a decision that was reached jointly by myself and my boss, and perhaps his consultation with his boss although, again, I don't know that from my personal recollection.

"Q But you do have a recollection of reaching that view with Mr. Smith?

"A Yes, I do.

"Q Did you reach the view for the reasons that you have already expressed?

"A There were other reasons.

"Q Perhaps you better give us the reasons that you reached the view that you did.

"A Certainly of paramount concern was the undesirability of asking the Bell operating companies to go before their state commissions and reopen their Centrex tariffs so very soon after they had gone through a rather torturous series of proceedings in most jurisdictions to get those tariffs approved.

"That concern was weighed against considerations of the impact of the tax itself, the difficulty in administering a somewhat more complex rate structure if we were to pursue that road as compared with what we had at that time, the administrative difficulties of doing that.

"It was our understanding at that particular point in time that the tax would be reduced from ten to three percent very shortly. I think something like January '65, and that the tax law as then written contemplated the complete expiration of the tax within, I think, two or three years after that on a progressive basis so that, again, my recollection is by January '68, there would, in fact, be no tax on those services and that that prospect coupled with the recognition that the efforts to restructure the tariffs would enta... rather long periods of regulatory consideration and might, in fact, not even be accomplished in some places until the tax was eliminated anyway, led us to believe that the effort was just not worthwhile.

"Q After the passage of the act in June of 1965 and up through the time when you were still involved in Centrex matters, did you follow up and consider whether the time would become appropriate to reconsider restructuring the Centrex tariffs?

"A During the time period that you cite, I don't recall that we reconsidered that particular question.

"Q Let me show you a document which has been stamped 00294 through 00302."

That is Exhibit 76, your Honor, which is the letter of Mr. Ferrall to Mr. Woodworth, which you have seen.

THE COURT: Yes.

MR. NICKERSON: Continuing with the question:

"It is a letter dated December 17, 1964, signed by Victor E. Farrell. It is addressed to L. N. Woodworth.

"Have you seen that before?

"A I had not seen this letter before Mr. Struve showed me a copy within the past few weeks.

"Q In December of 1964 were you advised that the general tax attorney's office was writing in response to questions with respect to Centrex service by the staff of the Joint Committee?

"A Yes, I do recall that such questions had been raised.

"Q Do you recall having conversations with anyone in the general tax attorney's office of AT&T at or around that time?

"A Yes, I do.

"Q Whom was that with?

"A I believe, to the best of my recollection, my conversations were with Mr. Charvat.

"Q Do you recall the substance of what you said to him?

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"A I recollect that Mr. Charvat indicated that questions had been raised by the Congressional committee, or the Staff, rather, as to the revenue impact upon the federal government of including or not including Centrex either on a split or otherwise and in order to quantify such tax revenue impact, I was asked by Mr. Charvat to make certain estimates as to what total customer charges might be involved and then at that point he would further estimate what the tax effect might be under the conditions of either leaving it alone or possibly using a split of the type described in my '64 letter, as I recall.

"Q Do you recall discussing with Mr. Charvat or Mr. Ferrall in or around December of 1964 as to the question of whether Centrex tariffs should be separated?

"A The separation of Centrex rates was considered, as I stated several times before, in informal discussions that we had during that period, yes.

"Q Had you and Mr. Smith reached your decision with respect to whether or not AT&T would recommend separation of Centrex tariffs by December 17, 1964?

"A My recollection is that our decision had been made some time shortly prior to this date, at least prior to this date, that we would not recommend such a split to the companies at that time.

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"Q Did you discuss that with anyone in the general tax attorney's office prior to December 17, 1964?

"A That decision was discussed in meeting which included the tax attorney people, is that what you asked?

"Q Yes.

"A Yes.

"Q Who else attended those meetings?

"A I recall that Mr. Burroughs and Mr. Erickson of our comptroller's department were present.

"Q Anyone else that you recall attending those meetings?

"A I don't recall anyone else.

"Q Ferrall, was he there?

"A Whether he was present at a particular meeting, I don't know.

"The group of people that I enumerated earlier, namely, Mr. Ferrall, Mr. Charvat, Mr. Erickson and Mr. Burroughs were all involved in discussions on this particular subject. Who was present or not present at any particular meeting, I don't recall.

"Q What I am getting at is you informed those gentlemen of your decision prior to December 17, 1964?

"A I believe we did, yes.

"Q Yes. And did you inform them of the reasons that

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you had reached that decision?

"A Yes, I am sure we did.

"Q Were those the reasons that you have testified to already?

"A Yes, they were.

"Q Do you recall whether they had any response, those gentlemen?

"A I don't recall any response."

At this point, your Honor, I will come back to Mr. Weber's deposition, but I am going on chronologically to another subject, if I may, and that is the reference in Mr. Weber's testimony to objections that were raised to the Centrex rates, and I would like to address myself to that.

THE COURT: Is that agreeable to you, Mr. Struve?

MR. STRUVE: Yes, it is.

MR. NICKERSON: First, your Honor, may I direct your attention, rather than put in the documents, to paragraphs 43 through 45 of the stipulation as to documents.

THE COURT: I would like to look at it first.

Paragraphs 43 through 45?

MR. NICKERSON: Yes, your Honor.

(Pause.)

MR. NICKERSON: These say in substance that the U.S. government in various capacities filed a protest to the

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Centrex tariffs with the Tennessee Public Service Commission, which were dismissed in April of 1963, that the Chancery Court in Nashville, Tennessee, on March 25, 1964, denied a petition for certiorari against the members of the Tennessee Commission and entered an order of dismissal of an appeal to the Supreme Court of Tennessee.

Paragraph 45 refers to the United States government, through the Judge Advocate General and other executives on behalf of various agencies filed a complaint in July, 1962 with the Louisiana Public Service Commission with respect to the Centrex rates and that no action was taken to prosecute that complaint.

Now, your Honor, I would like to --

THE COURT: There was testimony given by the witness Weber that the GSA --

MR. NICKERSON: Yes, I am about to come to that, your Honor.

He said he couldn't recall all of them, but he said he did recall the GSA, which I am now coming to, and I offer Exhibit 47 --

MR. STRUVE: Your Honor, for completeness of the record, I believe that Exhibits 43 and 44A through E and 45, should be before the Court. Those are the orders of the Tennessee Court --

THE COURT: Is there an opinion there?

MR. STRUVE: There was an opinion, Exhibit 44A, and the appeal to the Tennessee Court was withdrawn by stipulation.

MR. NICKERSON: I don't think they advance us any, but I would be glad to submit them, your Honor.

THE COURT: Of course, the stipulation indicates the filing of the petition and the dismissal.

MR. STRUVE: It is apparent from the text of Exhibit 44E --

THE COURT: Well, if you want it in the record, you may offer it.

MR. NICKERSON: If you want me to offer it now, I have no objection.

THE COURT: Well, actually I don't want either counsel to offer anything. I was hoping there would be a policy of restraint in the number of exhibits offered.

MR. NICKERSON: That was what I was trying to do.

THE COURT: If you want it in, offer it.

MR. NICKERSON: I will allow Mr. Struve to offer it.

MR. STRUVE: Your Honor, these were two of the only three complaints made during the entire period.

THE COURT: You made a reference to that in your

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opening statement.

MR. STRUVE: That's correct.

THE COURT: You also referred to it in your briefs.

MR. STRUVE: Yes.

MR. NICKERSON: Would you like me to offer it now?

THE COURT: Why don't you do it now, so you can have your record complete.

MR. NICKERSON: Exhibit 44.

While they are looking for that, may I go on?

I would like to offer now, your Honor, Exhibit 47, which is a petition of the GSA before the New York Public Service Commission, which objects to the Centrex rates, saying that the rates aren't warranted and that they are unjust, excessive and unreasonable.

THE COURT: Well, of course, the fact that the allegation is made that they are unjust and unreasonable does not establish the fact.

MR. NICKERSON: No, and I am not attempting to establish the fact, your Honor. The only thing I am attempting to establish here -- and I am going to offer further evidence on this point -- is that they knew that objection had been made and indeed, it was not disposed of, your Honor, until 1965, after the time that Mr. Weber and Mr. Smith made

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the decision not to unbundle the Centrex rates.

THE COURT: Well, I suppose Mr. Struve's answer to that is that particularly in the instance of those governmental agencies or those subscribers who did object to the Centrex rates they were knowledgeable by reason of their prior petitions and therefore, if they sought a separation they should have filed petitions thereafter.

MR. NICKERSON: They did, your Honor. They even took this one to court, and it didn't get disposed of until after Mr. Weber had made the decision, so that what we say -- and indeed he testified to that -- that he had in mind that GSA had made an objection to the rates and this is one of the reasons we say that it is fairly to be inferred that the reason they didn't want a wholesale, all-over-the-country re-opening of the Centrex rates is that if they had filed even so simple a thing as splitting the rates without changing the charges it might have expanded it to the point where the validity of those rates might have been drawn into question and where the excessiveness of those rates might have been drawn into question.

But we aren't attempting, your Honor -- contrary to what Mr. Struve said -- we aren't attempting to prove that these rates were excessive. All we say is that this has a bearing on what they thought and what they thought was important at the time they made the decision not to separate.

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That is all I am saying -- a very modest proposition with respect to these.

So I have offered Exhibit 47, the petition of the GSA.

Is that objected to?

MR. STRUVE: No objection. We obviously do not vouch for the statements made therein.

THE COURT: Well, I anticipated that, didn't I? It is a mere allegation in a complaint.

You know, I have frequently said in opinions that serious charges of conspiracy are easier to make than to establish, but this isn't an allegation of conspiracy.

MR. NICKERSON: I would like to offer Exhibit 48 which is the answer of the New York Telephone Company to the complaint and there are a couple of things that I would like to draw your attention to --

THE COURT: This goes back several years before the tax exemption statute was passed.

MR. NICKERSON: Indeed, your Honor. That's my very point.

THE COURT: What is your point?

MR. NICKERSON: My point is that all of this was pending, your Honor, at the time Mr. Weber made the decision with his boss that the Centrex rates would not be

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separated and that one of his concerns was that a separation of those rates, even such a modest one which wouldn't change the amount of charge to the customer could have broadened out --

THE COURT: Mr. Nickerson, you aren't adding anything to his testimony. His testimony was quite detailed.

MR. NICKERSON: That's my point.

THE COURT: All right. Go on to the next point.

MR. NICKERSON: But what I would like to draw your attention to with respect to this Exhibit 48, your Honor--

THE COURT: You know, I did say to you a moment ago -- no doubt Mr. Struve would answer it, and part of his answer would be that in the case of these three groups that challenged the Centrex rates -- I think one was in Tennessee, and the other was in Louisiana -- and the GSA were knowledgeable subscribers and knew their way around, and if they were minded to attack the failure to separate the charges they had enough experience to know how to proceed. That is part of his claim, that they failed to move forward and I find a statement here in there very responsive --

MR. NICKERSON: Your Honor, GSA was tax exempt. They weren't claiming that they should be separated.

THE COURT: They were challenging the rate.

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MR. NICKERSON: They were attacking it as excessive and unjust. If someone else had come in and simply had modest thinking of separating without changing the rates, the concern was that that would open up the whole thing, and someone else would come in, maybe lowering and challenging those rates. That is the very narrow thing that I have offered.

THE COURT: You have said that three times in the last six minutes.

MR. NICKERSON: I apologize.

THE COURT: Well, the repetition may add emphasis.

MR. NICKERSON: Your Honor, Exhibit 48 has a very good description of Centrex service from page 11900 on. But in particular, on page 11908 of Exhibit 48, they make a distinction between Centrex CO, which is what GSA was getting and Type 4 Dial PBX.

Now, Type 4 was essentially the same as Centrex CU. That is to say it was Centrex with inward dialing and identified outward dialing features. In the bottom of the page they set out what are the advantages of Centrex CO over CU, where the switching was on the customer's premises, and in particular I would draw your attention to the item numbered 1 down near the bottom of the page, which says that the subscriber is spared the cost of any construction or

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alteration to strengthen his building to accommodate the dial-switching equipment, which in the case of Centrex would be located on the Telephone Company's premises, and then in the nex paragraph, you have the additional facilities which would be available with CO without delay after the initial installation, and less trouble and bother to the customer.

So that simply he adds to what we saw yesterday on the advantages of CO as against CU. That's all I wanted to draw your attention to.

THE COURT: Well, if I am not mistaken, the statement was made that those advantages explain the additional cost, that is, the cost of operating CO was greater than the CU operation.

MR. NICKERSON: But primarily, your Honor, if you will recall, because of the cost of the pair of wires that went from the customer's premises all the way to the Telephone Company's premises, it is true it costs more to render Centrex CO, but they didn't charge more for it except a minor amount to recognize the space on the Telephone Company premises and the power used by the Telephone Company.

THE COURT: Is it your position that they should have charged more?

MR. NICKERSON: My position, your Honor, is not that they should or shouldn't have. It is only that this was a matter that would have concerned them before the regulatory agency.

THE COURT: That comes back to your original point that that is the principal reason that they didn't get into the whole process of separating the charges, because it would open up or might open up the whole question of the rates.

MR. NICKERSON: Yes.

Now, your Honor, in Exhibits 49A, B and C, they are simply the decision, order and opinion of the Public Service Commission in which they dismissed it without giving a hearing. I don't know that the substance of that --

THE COURT: It will only take me a minute to read it. I will read it now.

MR. NICKERSON: All right.

(PAuse.)

MR. STRUVE: I have no objection. I would just like to note for the record that this first dismissal by the Commission was more than a year and a half before December, 1964.

I am sure your Honor has noted that.

MR. NICKERSON: Now, your Honor, the GSA brought an action in the State Supreme Court which decided that the Public Service Commission should hold a hearing, and I will mplt

offer Exhibit 51B and 51C, which is the memorandum, decision and order of the Supreme Court, Albany County, the order being dated March 30, 1964. So it was then in the courts. No final decision had been made.

THE COURT: Is the matter pending now?

MR. NICKERSON: No, your Honor. I am about to tell you when it concluded.

THE COURT: Would you hold it just a moment?

Was this an Article 78 proceeding?

MR. NICKERSON: Yes, your Honor.

(Pause.)

THE COURT: All right.

MR. NICKERSON: I misspoke, your Honor. The order, as you will see in handwriting, was entered August 24, 1964, not March. So it wasn't until August of 1964 that the order was made, remanding it to the State Public Service Commission for them to make an investigation.

THE COURT: Where is that? I see the date of the Court's opinion is July 17, 1964, and the date of the Justice's signature is 8/24/64. What is the status of that matter?

MR. NICKERSON: Your Honor, AT&T put in an answer and submitted material, which is Exhibit 52. I think it is important for you to see that. I will offer Exhibit 52.

THE COURT: This must be the answer of the Public

Service Commission.

MR. NICKERSON: No. This is the answer of New York Telephone.

THE COURT: They were a defendant in the case.

MR. NICKERSON: I haven't put in all the court papers, your Honor. They went back and made an investigation and asked AT&T to give them some information. This is a part, Exhibit 52, of the information which they submitted to the Public Service Commission, and the thing which I would like to draw to your attention is that part of the letter, the covering letter of Exhibit 52, in which they reaffirm that Centrex rates were arrived at primarily through rate relationship considerations and not on the basis of the cost of this service alone.

THE COURT: Where do you see that?

MR. NICKERSON: The second paragraph in Exhibit 52.

THE COURT: "In furnishing the information requested, we wish to affirm" -- all right.

MR. NICKERSON: They say, "The Centrex rates we believe fit equitably into the PBX rate schedule."

Now, finally, November 5, 1965, almost a year after Mr. Weber and Mr. Smith made the decision that the Centrex rates should not be separated, finally the decision comes down from the Public Service Commission reaffirming what it said before, namely, that it wasn't going to change those rates, and that is Exhibit 53, which I will offer.

THE COURT: Well, except this time the Commission acted upon a report by its Telephone Bureau.

MR. NICKERSON: Yes, your Honor.

THE COURT: And finally he discussed the matter in detail and made a recommendation.

MR. NICKERSON: Right.

THE COURT: All right. Proceed, please.

MR. NICKERSON: Now, your Honor, I am moving on to another topic.

MR. STRUVE: Mr. Nickerson, before you move on, I believe it would be helpful to the Court if with respect to Exhibit 53 I pointed out that the critical part of the reason w the Commission adopted the report of the Telephone Bureau appears at page 12342.

THE COURT: I thought you were going to refer me to page 12344, but put on the record what you want to, right now.

MR. STRUVE: The other point that I believe should be made, in fairness, is that Mr. Nickerson has repeatedly tried to suggest that from these documents one could infer that Mr. Weber in 1964 was worrying whether the Centrex rates would be held to be too high. On the contrary, as he testified at page 48 of his deposition, that he was concerned that they might be increased.

MR. NICKERSON: Your Honor, that's not the way I read the deposition. I think he said it was a possibility. But I think the deposition as a whole reflects what he meant and I won't characterize it further.

Now, I am moving on to another topic, your Honor, if I may --

THE COURT: Well, as long as we are on this, what is your understanding -- I will take the answer from each of you; you will probably not agree -- on page 12344, this is the report of the Commission talking about the Herculean task that would be presented on the previous page, if consideration were to be given to a pure cost basis so far as all of the services of the company are concerned. "An overwhelming task...since each and every service and item of equipment would have to be studied separately and of necessity such study would have to recognize historical development."

Then it continues:

"More important, it is our judgment that after completion of this Herculean task the revenues required would have to be produced from the ordinary telephone customer. This general increase in rates for the basic service would be detrimental and could be classified as unduly discriminatory in that a share for the specialty services would be imposed on normal rate payers subscribing to only the basic service."

MR. NICKERSON: Your Honor, I am not attempting to make this a rate case and I am not saying what the regulatory commissions would do. The only purpose I have in this evidence is to show that they did attack the rates, that the cost of PBX service was less, relatively -- excuse me. I have misstated myself -- that in the initial Centrex material it was said that one of the objectives was to get an increase in rates on the old PBX equipment without going back to the regulatory agencies to get an increase in rates, and what they come back with, they say, is that, "You don't relate it strictly to cost," that there is an element discussed in Mr. Brady's report of "value of service" which is taken into account, and therefore a customer has a greater value of service with Centrex service than he does with ordinary dial PBX which doesn't have direct in dialing or identified outward dialing.

So even if the cost were the same or less than PBX it is justifiable to charge him at a higher rate than someone who has PBX service.

But I am not in the middle of a rate case. I am not purporting to show that these rates were excessive. I am attempting to show that attacks were made. We have it in the record here that they didn't want to reopen it so it would subject the rates to some kind of attack. What would happen to those rates in the 48 Commissions and District of Columbia, would be a matter of speculation as to what each Commission would do.

MR. STRUVE: Your Honor, I believe it would assist the record if I pointed out that at .26852 of Exhibit 43 --

THE COURT: Which exhibit is that?

MR. STRUVE: 43, your Honor. The Tennessee Commission's decision.

THE COURT: Please wait until I get to it.

Don't you have 43? It was handed up.

(Pause.)

THE COURT: All right. I have it.

Go ahead.

MR. STRUVE: In paragraph 4, the Tennessee Commission made the same point as the New York Commission made in Exhibit 53, that if eventually there might be savings from Centrex service, those shouldn't only accrue to the users of Centrex but to the subscribers as a whole.

This philosophy was regarded all throughout the period that we are talking about. I believe there were only three complaints in the whole country during the period we are talking about. When we think of 50 jurisdictions, three is abou the smallest number you can get, and each of these three complaints had been dismissed at least once by December 1964.

THE COURT: Was Exhibit 43 offered in evidence?

MR. NICKERSON: Yes. I offered the one Mr. Struve asked me to offer, but --

MR. STRUVE: I asked for 43 and 44A through E and 45.

MR. NICKERSON: Perhaps you did. I don't remember hearing you say that.

THE COURT: Well, don't argue. It is received.

MR. NICKERSON: Your Honor, may I pass on to another subject?

THE COURT: Another deposition?

MR. NICKERSON: No, it is more documents, your Honor.

THE COURT: Well, if it is another subject, why don't we take a short break now?

(Recess.)

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THE COURT: Proceed.

MR. NICKERSON: I said before the break, your Honor, I am now turning to another subject that is subsequent to the passage of the Act, the position that AT&T took with respect to separation of charges.

First I would like to offer Exhibit 102, which the stipulation of documents recites is a letter dated June 21, 1965, with an attached list which was sent by Victor E. Ferrall to the general counsel of all the defendant operating companies.

You will see in the first paragraph of the exhibit the page marked 00054, the last sentence of that first paragraph, that there is enclosed a comprehensive list of services offered by the Bell System companies with their preliminary classification under the Act.

And if you will look on page 00056, you will see that unrestricted Centrex service is under the column entitled "Tax Status," noted as taxable.

THE COURT: Proceed.

(Plaintiffs' Exhibit 102 was received in evidence)

MR. NICKERSON: Now, your Honor, I offer Exhibit 106, which is a memorandum sent by Victor E. Ferrall, dated September 3, 1965, to all the general counsel of the defendant operating companies, and attached to it is a letter dated the same date, sent by R. N. Flint, assistant comptroller, to the comptrollers of all the defendant operating companies, and what that letter from Mr. Flint does was to call a conference with respect to the Excise Tax Reduction Act of 1965, of the people in the operating companies. As they put it, in the middle of thepage 14776, "System people responsible for the intepretation functions."

There are two sessions, you will see, scheduling one for October 6 and 7, and one for October 13.

(Plaintiffs' Exhibit 106 received in evidence.)

Now, your Honor, I offer in evidence Exhibit 108B, which the stipulation as to documents recites was prepared by the comptroller's department of AT&T, and copies of it were distributed to the conferees at meetings referred to in the exhibit held October 6 and 7 and October 13 and 14 in New York.

I think it is worth just glancing at this, your Honor. What it shows on page 00066 are the participants from AT&T, including Carl E. Erickson from the comptroller's department, Mr. Charvat from the legal department, and Mr. Weber, who is the exchange rate supervisor, from whom you heard.

And then the participants are listed from the

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operating companies and from other parts of the Bell System are listed on pages 00067 through 71.

If you will notice, on the page which is entitled "Agenda," page stamped 00072, you will notice alongside "2 o'clock," "Special Problems," and then under that "Package pricing; marketing and rate viewpoints (including Centrex)." And among other speakers listed on the righthand column are R. D. Weber.

MR. STRUVE: Your Honor, with respect to Exhibit 108B, perhaps I am about to point out the obvious, but I believe Mr. Nickerson will agree with me that the participants and agenda listed in Exhibit 108B were the projected participants and the planned agenda. Because Exhibit 108B was prepared before the meeting itself.

MR. NICKERSON: There will be testimony on that, your Honor.

(Plaintiffs' Exhibit 108B received in evidence.)

THE COURT: Proceed, please.

MR. NICKERSON: Your Honor, I would like to offer Exhibit 108A, which the stipulation of documents recites was prepared by the comptroller's department and copies were distributed to the conferees that are referred to.

It also includes the agenda, but there were

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some parts missing from the agenda, some pages missing from 108A, which is why I had to give you 108B.

xxx (Plaintiffs' Exhibit 108A received in evidence.)

But for present purposes what I would like to refer you to is a memorandum which was prepared by the general tax attorney's office and indeed was sent at an earlier date, it is stipulated, to the general counsel of the operating companies, which discusses the communication services under the Excise Tax Reduction Act of 1965. It commenced at page 14797.

In that connection, your Honor, I would like to read from the deposition of Mr. Ferrall, if I could ask Mr. Heller to take the stand, what Mr. Struve previously asked me to read, and now it comes in in its chronological place.

THE COURT: Whose deposition is this?

MR. NICKERSON: This is Mr. Ferrall, your Honor, the general tax attorney, whose deposition you have heard in part.

THE COURT: All right.

MR. NICKERSON: I am starting at page 45, line 8:

"Q I will specifically draw your attention to the language starting on the third line of 00038" --

Your Honor, that is now 14803 in Exhibit

108A.

THE COURT: What page is that?

MR. NICKERSON: 14803 it is stamped, of Exhibit 108A.

THE COURT: Go ahead.

MR. NICKERSON: All right.

"'. . .an allocation of the single charge into a portion that is considered to be pertinent to the "access" and "privilege" and a portion that is not would have no effect on the imposition of the tax.'"

THE COURT: Pardon me, where are you reading from?

MR. NICKERSON: I am reading from the deposition, your Honor, and the language -- I am not quoting the language from page 14803, near the top of the page, of Exhibit 108A.

THE COURT: I see.

MR. NICKERSON: Which is the memorandum that Mr. Ferrall sent.

"A Yes.

"Q Do you recall participating in the drafting of that language?

"A No.

"Q Do you recall any discussions with anyone in your office with respect to that matter?

"A Not specifically in connection with this memorandum. Dr. Woodworth had asked us some questions about the possibility of changing the charge for unrestricted Centrex stations and there was some discussion then as to whether there was any way that it could be apportioned. I think that led to the conclusion that under the law you would have to have something more in the law than that, but I don't recall.

"Q Do you recall anything more about that conversation with Mr. Woodworth other than what you have told us?

"A I am not referring to a conversation. I am referring to the question that he asked which I answered by letter.

"Q I see. It was not a part of the November 9th meeting then that you are referring to?

"A Well, again, Mr. Nickerson, and I don't want to seem unpleasant about this, but I don't have specific recollections of words uttered by anybody there. There was, as I told you, there was discussion of Centrex and our Draft A, why we had been unable to find any language that would take care of the unrestricted stations and there was discussion of that all the way through. I remember this fellow Gibb had a terrible time understanding what Centrex service was and I was having difficulty understanding. It was a relatively new service at that time.

"Q How new was it?

"A Well, as I recall, that was the first time I had heard of it in connection with the drafting that we started in 1964, but that doesn't mean it hadn't been around for a while.

"Q All right, I will get back to that.

"Drawing your attention to this language that I have read to you starting with the words, '. . . an allocation of the single charge. . .' Do you recall any discussions within AT&T, including your office, of the problems presented with respect to making an allocation on the books of the telephone company rather than a change in the tariffs?

"A The only conversations that I recall, and I have only a general recollection then, were in connection with that letter that I wrote responding to Dr. Woodworth's inquiries.

"Q Let's turn to that letter, which is document 00294 through 00302."

That is Exhibit 76, your Honor, the

December 17 letter, to Woodworth from Ferrall.

THE COURT: Is that the one answering the three questions?

MR. NICKERSON: The three questions.

"Is that the letter that you wrote to Dr. Woodworth?

"A Yes.

"Q Let's take a look, Mr. Ferrall, at page 00299, the sentence which starts three lines from the bottom of that page, 'The separation required to exempt part of this charge from tax could be made by some sort of allocation on the telephone companies' books only if a specific addition to that effect were made to Draft A or if such a position were to be adopted in Treasury regulations or rulings.'

"Now, do you recall any discussion of that matter at the November 9, 1964 meeting?

"A No. There may have been, but I don't recall it.

"Q Do you recall discussing it with anyone in the government, the staff, the Treasury, the IRS after the November 9th meeting?

"A No. I recall this only as my own thinking here that absent a change in the tariffs that's the only way it could be done and I assumed that it would not be done and that's what I meant to say here. Dr. Woodworth was asking me how soon there would be a change as to unrestricted stations that would affect their revenues and I was trying to tell him here that I assumed that they wouldn't accept any allocation of this sort and, therefore, it would have to go into a regulatory proceeding before his revenues would be affected. That's all I mean to say in this sentence."

Now, your Honor, I would like to move on to another deposition, and that of Mr. Erickson.

Mr. Erickson, you will recall, was in the comptroller's department, and you will recall that he --

THE COURT: He was a participant in the sessions, I believe.

MR. NICKERSON: He was a participant in the sessions, though not present at the November 9th meeting.

THE COURT: All right.

MR. NICKERSON: But you will recall from the agenda of the --

THE COURT: That is what I am referring to.

MR. NICKERSON: Yes. Excuse me, yes. He was a participant in conferences, Bell system conferences.

Just to give you his background first, I have to start at page 88, line 10:

"Q You have retired from AT&T?

"A Yes, sir.

"Q As of what date?

"A April 1st.

"Q And are you employed now?

"A No, sir.

"Q In what period of time were you with AT&T?

"A November 17, 1936, through March 31, 1976.

"Q And before November 17, 1936, had you been employed?

"A One year with the Firestone Tire & Rubber Company.

"Q Now, what positions did you hold in AT&T during that period?

"A Oh, I was involved in the corporate books section.

"Q Give us the dates, if you would, as you go along.

"A From 1936 through 1948, let's say, and I was in field audit work for a year following and then for the next four years --

"Q Those would be what years?

"A 1950 through 1954, roughly, I was in the accounting operations division.

"Q Of AT&T?

"A Of AT&T. All of this was AT&T, involved in writing methods for the system companies and in 1954 I was temporarily transferred to the tax division, from which I retired in 1976.

"Q Did you hold different positions in the tax division?

"A Yes, I started out as a tax accountant and was promoted in 1963 to supervising accountant. The responsibilities I had in both jobs just varied from time to time.

"Q What were they in substance?

"A Well, I had to supervise the research and analysis group which roughly looked into all new developments, new legislation, regulations, things of that type and also tried to respond to various articles on what a good corporate tax policy ought to be vis-a-vis the one we had and it involved pretty much everything except making up the consolidated return and the audits. I didn't have anything to do with that. And the excise tax, of course, because it had no other home, fell in my bailiwick.

"I was transferred up there in the first place to write the excise tax manual. Having written it I was saddled with the excise tax no matter what job I had when I stayed with them.

"Q Right up to he time you retired?

"A Yes, sir, and even afterward.

"Q Do you still act as a consultant to AT&T?

"A No, not for money. I get calls from my old cohorts now and then to answer a question."

Now I am going to page 4, and starting at line 6:

"Q Mr. Erickson, I will show you a document which has been marked in the upper righthand corner 00426 and ask you whether that is a memo which you wrote.

"A It is."

Your Honor, that is now Exhibit 205A, which I will put before you. I won't offer it yet.

"Q And you wrote it on or about the date that it bears?

"A Yes.

"Q Who was Mr. Halpern?

"A Mr. Halpern was my immediate supervisor.

"Q And what was his title?

"A Director-federal taxes.

"Q And are those your initials in handwriting at the bottom?

"A They are.

"Q Was that document written in response to a request of Mr. Halpern?

"A No, it was informative, as I recall.

"Q I will show you a document which has been stamped 00194 and 00195 and ask you whether that is a copy of the article which is mentioned after the word re on document 00428.

"A To the best of my recollection, it is."

"Erickson

That, your Honor, is Exhibit 205B, which I would like to put before you. I won't offer it yet.

Mr. Oberman tells me there is a misprint on a page that I read, from page 5, line 2. That should read 00426 rather than 00428.

"Q Referring you again to document 00426 and the first line of it, which starts, 'In 1965 we had systemwide conferences with legal, commercial, marketing, rates and tax accounting people' et cetera.

"Did you attend those conferences?

"A I did.

"Q I will show you a document which has been marked 00065 through 00083" -- That is Exhibit 108B, your Honor, the agenda of the 1965 October conferences -- "and ask you whether the conferences which you referred to in your memorandum 00426 were the conferences of October 6th and 7th and October 13th and 14th referred to on the cover page of 00065.

"A Yes.

"Q And if you will turn to page or pages marked 00072 and 00073.

"A Yes.

"Q Did that represent the agenda for both of those conferences, that is to say the one of October 6th and

7th and the one of October 13th and 14th?

"A A couple of the names may have changed from one to the other, but the agendas were the same.

"Q Did you help prepare the agenda?

"A Yes.

"Q Were all of the operating companies of the Bell System present at one or more of those two conferences, representatives of those companies?

"A Yes.

"Q Can you separate out in your own recollection what went on in one conference rather than the other?

"A The reason it was broken down into two conferences was merely a matter of numbers. We had about 50 at each conference.

"Q Was it basically the same discussion at each of the two conferences?

"A Same discussion, give or take differences in personalities.

"Q Now, I'm interested, Mr. Erickson, in the discussion of Centrex service at that conference and I'm going to go down the agenda which is marked 00072 and ask you with respect to each of those items whether Centrex service was discussed at that place in the agenda.

"Let's start with the conference arrangements which, according to the agenda, was something that you presented. Did you discuss Centrex during those remarks?

"A No.

"Q Did Mr.--it is J.F. Gallagher?

"A Yes, it's Gallagher.

"Q Did he discuss Centrex, do you remember in the outlines of departmental concerns?

"Mr. Struve: If you recall.

"Q Yes, all of this is if you recall, you understand that.

"A Not that I recall, no.

"Q How about any of the other gentlemen that are mentioned to give presentations under outlines of departmental concerns?

"A The departmental concerns were, as I recall, very largely just opening remarks to indicate who the department representative was so that the people from his department in the associated company would know who he was.

"Q How about Mr. Charvat's remarks about the background and philosophy of the Excise Tax Reduction Act of 1965, did he discuss Centrex in those remarks?

"A As far as I know, yes.

"Q What did he say?

"Mr. Struve: If you recall.

wc 4 "Erickson

"Q All of this is if you recall, of course.

"A I think he merely pointed out to the people with respect to the Centrex service the tax would have to be collected on the whole thing until such time as a tariff split was made, as worded right out of the committee report.

"Q Refer back, if you would, to 00426, which is your memorandum." That is Exhibit 205A. "Is it your recollection that it was Mr. Charvat who pointed out that 'Centrex tariff precluded our splitting out the so-called 'private communication service' element and treating it as non-taxable'?

"A Pointed out to whom?

"Q That's a good question. Who did he point it out to at the conference? Who did you mean to indicate in the first paragraph of the memorandum stamped 00426?

"A All right. That was done numerous times at the meeting.

"Q By several people?

"A Several people including participants from the companies as well as our own.

"Q Do you remember who pointed that out besides Mr. Charvat?

"A No, I couldn't. I couldn't.

"Q Was there discussion of that point?

"A I'm not sure, but I would expect so. That was a key presentation of the conference.

"Q Do you recall what that discussion was? Do you have any recollection of what that discussion was?

"Mr. Struve: Beyond what he's already testified?

"Mr. Nickerson: Yes.

"A Most of the discussion, to my recollection, involved that new category private communication service that had been established for the first time in the law.

"Q What was said about that?

"A Just questioning by the people there as to what it was and what it included.

"Q Do you recall what was said specifically?

"A It was pointed out that, as I recall, that it did include the PBX service category, but did not include Centrex.

"Q Do you recall anything more said on that subject?

"A No, I don't specifically. There was a lot on it.

"Q Do you have any way of refreshing your recollection that you know of?

"A No.

"Q Do you recall whether the conferees discussed ways of obtaining tax relief for the customers of unrestricted Centrex?

"Mr. Struve: Beyond what he's already testified to?

"Mr. Nickerson: I don't think he testified to that subject at all.

"Mr. Struve: He's testified that--

"A There was some mention of the fact that it would put PBX in a more favorable position taxwise vis-a-vis Centrex.

"Q Was there any discussion to your recollection, and all of this is what you recall, obviously, of how one might gain tax relief for the customers of Centrex?

"A Yes.

"Q What was that discussion?

"A To the effect that it would require a change in the tariffs in order to obtain that tax relief for the customers.

"Q That's all you recall on that subject?

"A Yes.

"Q Was there any discussion of whether an allocation on the books of the telephone companies could make part of the unrestricted charge not subject to excise tax?

"A At the conference?

"Q Yes.

"A I don't recall any.

"Q Was there some other time when that question was discussed?

"A Yes.

"Q When was that?

"A During the period prior to enactment of the law.

"Q Were the conferees told of any discussions with the government staff employees regarding Centrex which occurred prior to the passage of the act?

"A I don't recall.

"Q Were they told what language was submitted by the Bell System to the congressional staff?

"A I don't think there was too much dwelling on the background at this conference.

"Q You don't recall anything on that subject?

"A No, I don't.

"Q Take a look, if you would, at the second paragraph of your memorandum 00426, which reads in part, 'The rate people, pursuant to a top level decision, were adamant against making the required tariff filings.'

"Did the rate people so state at these conferences?

"A Yes.

"Mr. Struve: If you recall.

"Mr. Nickerson: All of this -- you don't have to interrupt unless you wish to. All of this is what he recalls.

"Q What did they say on that subject?

"Mr. Struve: I should state, Mr. Nickerson, that where a question seems to me to be incomplete or objectionable, it is my duty to so indicate and I shall do so.

"Mr. Nickerson: Did I add a question? I think I did.

"Would the record please indicate that Mr. Struve is conferring with the witness.

"Mr. Struve: The record should indicate that the only thing I stated to Mr. Erickson is that it would be helpful if he would wait before answering the question to give me an opportunity to object."

THE COURT: Now, do you need all that in the record?

MR. NICKERSON: I think it is useful, your Honor.

"(The record was read.)

"A As I recall, the rate representatives said that Mr. Kertz said that the tariffs would not be revised at this time. They had just gotten them through all of the various rate commissions with great difficulty and they would stand a great chance of losing the whole thing if they opened up that can of worms.

"Furthermore, the rate people said that the intercommunication and central office connection elements of the Centrex system were inextricably commingled.

"Q Do you recall anything" --

THE COURT: Wait. Mr. Struve is on his feet.

MR. STRUVE: I simply wish to move to strike as speculation and hearsay the first paragraph of Mr. Erickson's answer which runs from line 13 to line 18.

Again, it is a stipulated fact in the stipulation of facts that Mr. Kertz had left the job more than a year before this, and I quite frankly don't understand why the plaintiffs are offering that testimony in view of that fact.

MR. NICKERSON: Your Honor, they could have asked him. He was the one who started the Centrex thing.

It would not matter whether he was head of the rate section or not. He certainly could have been asked about that. And this is testimony as to what he heard the rate representative say. They can come and contradict it if they wish.

THE COURT: I will leave the answer in under my general rule. But, Mr. Struve, of course I heard your statement and the basis of your objection; frankly, I don't know why you are objecting to it at that. This does in some measure reflect the position that you referred to yesterday in your opening statement. Indeed, it is rather interesting to me that this witness answered that there was some concern if they opened up that can of worms.

MR. NICKERSON: Exactly.

THE COURT : The very language, I think, I used yesterday when you made the explanation. Of course, I have no judgment about the matter. Why do you really want this out? Well, don't answer. I will let it stand.

MR. STRUVE: My position is that simply there is enough probative evidence in the record that we don't need speculation and hearsay.

THE COURT: And I have said repeatedly that I will be governed only by probative evidence, so why are you so concerned about it?

MR. NICKERSON: May I go on, your Honor?

THE COURT: Yes.

MR. NICKERSON: Picking up with line 22:

"Q Do you recall anything else on that subject?

"A No.

"Q Now, who were the rate people who so stated?

"A Mr. Weber and his pinch-hitter at one of the conferences; he only appeared at one. I remember he had a substitute for the second, Mr. Shepherd.

"Q How do you spell it?

"A S-h-e-p-h-e-r-d.

"Q Now, who was Mr. Kertz at that time?

"A My recollection was that he was a vice president in the rate division.

"Q Did these rate people explain why there was a chance of losing the whole thing if that can of worms was opened?

"A I believe so, yes.

"Q What did he say or what did they say, rather?"

THE COURT: Pardon me for interrupting. Will testimony be offered of Mr. Kertz in this case? Is his deposition going to be read?

MR. NICKERSON: I did not intend to read it on my direct case, your Honor. I think it would simply be cumulative.

THE COURT: The reason I ask is because of the last objection made by Mr. Struve. It seems to me that if you have the person who is knowledgeable on this subject, that perhaps we are wandering a bit afield in getting this hearsay testimony. It is not attributed to anybody in particular.

MR. NICKERSON: It is, your Honor, excuse me. It is attributed to Mr. Weber --

THE COURT: "Rate people" is rather an anonymous term. I don't know who the rate persons were when he used the term "rate people."

MR. NICKERSON: No, it was read to you earlier that it was testified that that was Mr. Weber and Mr. Shepherd.

THE COURT: Is that who he is referring to?

MR. NICKERSON: Yes, your Honor.

THE COURT: Then you have Weber's testimony here?

MR. NICKERSON: I don't have it on this point, your Honor. I am coming to that, and he said he didn't recall this.

THE COURT: Go ahead. I really must say that at times I indicate that perhaps Mr. Struve is overcautious about this, but we are really getting a tremendous amount of hearsay evidence in here. Let us go ahead. I think you will wind up this case much sooner if I don't make any further comments.

MR. NICKERSON: Your Honor, this was a fellow --

THE COURT: Please. I said go ahead, now.

MR. NICKERSON: (reading)

"Q What did he say or what did they say, rather?

"A I think I gave you what I recall that they said in an earlier answer, that it had been a difficult job to get these tariffs through all the respective commissions. It had just been completed at a great deal of effort and so forth and they were very, very reluctant to even talk to the commissions about as delicate a subject as that.

"Q Do you recall anything else on that subject being said at this meeting?

"A Other than just general discussions, that I have no recollection of the specifics of.

"Q Do you recall whether the rate people said when Mr. Kertz had told them this?

"A Not to my recollection.

"Q Is Mr. Kertz the person whom you referred to in the second full paragraph of 00426 as the person who made the 'top level decision'?

"A Without a doubt.

"Q Do you recall whether the rate people told you specifically--told the conference specifically what the difficulties were that were experienced?

"A I don't understand your question.

"Q Okay. Perhaps this will help you. Let's read the second half of the second full paragraph on 00426, 'the reason being given that the establishment of Centrex tariffs had been very difficult and it was not desirable to reopen the matter to save the tax.'

"Did they go into detail as to what those difficulties had been?

"Mr. Struve: If you recall.

"A Not as I recall.

"Q Did the rate people to your recollection tell the conference that customers had objected to the Centrex rates?

"A No.

"Q Do you recall whether the rate people said at these conferences that there had been no objections by customers to the Centrex rates when they were introduced?

"A I don't understand your question. Are you referring to tax at all here?

"Q No. I'm directing my questions now to the difficulties which you refer to in the second paragraph of your memorandum dated May 9, 1972, in establishing the Centrex tariffs, and what I am asking you is whether there was any discussion, to your recollection, at these conferences in October of 1965, of whether customers objected to the Centrex tariffs or whether they had not objected to the tariffs.

"A There was none at all. This was a tax conference.

"Q Was there any, to your recollection, discussion at the conference of the possibility if the Centrex tariffs were amended of customers having the opportunity to object to the Centrex tariffs?

"A Do you mean that if there were a reopened rate proceeding, that it would again give customers a chance to come in and object to the basic rates themselves?

"Q Yes.

"A No, that's a new thought even to me.

"Q Now, if you will take a look at the last paragraph of your memorandum 00426, the first part of the sentence.

"A Right.

"Q Do you see it?

"A Yes.

"Q 'In this case the failure to act cannot be ascribed either to us or to our legal coordinates.'

"Who does 'us' refer to?

"A My own organization, the tax organization in the comptroller's department.

"Q And who are the legal coordinates or who were the legal coordinates?

"A It was Mr. Charvat followed by Mr. Gomperts later.

"Q The next sentence, 'We have encouraged our rate people to make the change...'

"When was it that you encouraged the rate people to make the change?

"A Starting right at the conference because we, of course, were interested in reducing the amount of tax.

"Q You so stated at the conference?

"A Yes.

"Q You personally?

"A Yes.

"Q Anyone else encourage the rate people--

"Mr. Struve: If you recall.

"Q --to make the change, if you recall?

"A I have a recollection that one or two of the conferees said, 'Hey, if you change the tariff it will make our job of selling easier,' something to that effect. I don't have a specific recollection of a recordable item.

"Q Do you know who those individuals were?

"A No. As I said, there were 50 at each conference and running the conference was enough. I couldn't do much else.

"Q Do you recall anything more of what you said, specifically, in encouraging the rate people to make the change?

"A When?

"Q Well, at the conferences.

"A No, that's all--at the conference we did point out that the ball was on their side of the net.

"Q And after the conferences and up through 1970, did you encourage the rate people to make the change?

"A Yes.

"Q How many times?

"A Oh, speculating four or five.

"Mr. Struve: Object and move to strike the answer on the ground that it's speculative.

"Q Give your best recollection of how many times you encouraged the rate people to make the change.

"Mr. Struve: Objection.

"A More than two, less than six.

"Erickson

"Q Can you fix any specific years in which you so encouraged the rate people to make the change?

"A Not from memory.

"Q Do you have something that will refresh your recollection?

"A I don't with me, no.

"Q Do you know of anything in the files that would refresh your recollection?

"Mr. Struve: Objection.

"A A general statement that every time we did get an objection, it became a matter of writing where we raised the question again.

"Q You mean an objection from a customer?

"A Or something like this McDonnell thing, 'Why did you change them,' keeping in mind it wasn't our business at all. That was the rate people's business.

"Q By rate people, you mean the rate people on AT&T?

"A And the companies. I guess AT&T primarily, yes.

"Q Did they make any response, the rate people to your remarks at the conference encouraging them to make the change?

"A Yes. As I recall, it was just a flat statement that there was no plan under way at all to change the tariff.

"Q Did any representative of the operating companies at those conferences say that they would go ahead and separate the unrestricted Centrex charges anyway?

"A No.

"Q Tley all agreed that they would not separate?

"Mr. Struve: Objection. That's very leading."

MR. STRUVE: Perhaps I can shorten this.

MR. NICKERSON: May I just read the objection.

"Mr. Nickerson: Of course. This isn't my witness. This is your witness.

"Mr. Struve: I object on the ground it calls for a legal conclusion and on the ground you are trying to get an answer which will, you hope, prove an essential element of your case simply by slipping it in at the end of a series of questions about a meeting as to which the witness has given you his best recollection already.

"Mr. Nickerson: Would you read my question and would you answer the question, please.

"(The record was read.)

"A I don't recall any agreement.

"Q Was there any discussion by the rate people of when, if ever, the tariffs might be changed?

"A Where would the discussion be?

wc 12 "Erickson

"Q I'm referring to the conference.

"A No.

"Q Let's take a look at the third paragraph of 00426.

"'Our files show a number of examples in the years following where our rate people even objected to any statement that the matter was being considered.'

"Did you go through the files yourself and ascertain that your files so showed?

"A At the time I wrote the memorandum I wrote it right off the top of my head.

"Q You knew there was such material in the files?

"A Yes.

"Q You had seen it theretofore?

"A I had seen it from time to time over the years.

"Q In the second sentence you refer to the fact that, 'We did not even quote the committee report," et cetera. Do you see that?

"A Yes.

"Q Take a look at Telephony article" -- that is Exhibit 205B, your Honor -- "which is 00194 and point out, if you would--I will ask you a preliminary question. Is the language, 'See underscoring in box' on the third paragraph--I've misled you. Come back, Mr. Erickson. Mr.

Erickson, look at 00426.

"A Right."

THE COURT: Where is 205B? I don't have it.

MR. NICKERSON: 205B has been offered, your Honor.

THE COURT: I have it.

MR. NICKERSON: At the top of page 21:

"Q I should have read that whole sentence to you which I will now do:

'We did not even quote the committee report because of certain wording which indicated a change was contemplated (see underscoring in box).'

"Did that box refer to a box in the Telephony article?"

Going down to the bottom of the page, line 23:

"Q Do you recall what language was underscored in that box?

"The Witness: Okay? I'm giving you a chance this time.

"A The last sentence,'Until such a separate is made, this exemption, therefore, will not apply in the case of Centrex service,' the very last paragraph in the second-- "

Do you see that, your Honor, on 205B?

THE COURT: No, I don't. I am looking for it.

MR. NICKERSON: Do you see the material in the box?

THE COURT: It is hard to read. It is very blurred here.

MR. NICKERSON: Yes. That was the best copy that they had in their files. It says --

THE COURT: I see it now.

MR. NICKERSON: It is quoted in the transcript before, your Honor.

THE COURT: All right.

MR. NICKERSON: (reading)

"Q I see it. I see it. You did not underscore you think the previous sentence to that which starts, 'However, it is understood that Centrex systems--' Do you see that in the box?

"A Yes, I see it but in the third paragraph I was referring only to that wording which would indicate a change was contemplated by the word 'until.'

"Q I'm wondering whether 'as yet' would also be wording which you underscored, that's all.

'Mr. Struve: Objection. Asked and answered. Argumentative.

"Q Do you recall that?

"A I wouldn't do this. This was a memo to my boss who knew that.

"Q How many examples were there that you referred to in the third paragraph of 00426 where your rate people objected to any statement that the matter was being considered?

"Mr. Struve: If you recall.

"A Half a dozen.

"Q In the more than two, but less than six instances which you testified to in which you encouraged during the years 1966 through 1970 the rate people to make the change, can you recall what their response--what the response of the rate people was?

"A Yes, that no change was contemplated.

"Q During the years 1965 through 1970, if you recall, was the question of separation of Centrex rates discussed at conferences?

"A Not at any conferences I attended.

"Q Did you hear of any conferences at which it was discussed during those years?

"A I don't recall of any.

"Q In any of these examples, which are referred to in the third paragraph of 00426, were you a participant in the decision not to quote the committee report?

"A No. I was a part of the discussion, but not the decision.

"Q What did you say in those discussions, if you recall?

"A It wasn't my department. That's the rate department.

"Q I understand it wasn't your department. You said you were part of the discussions and my question is--

"A We had this customer complaint, let's say in front of us and we talked about it and so forth. The letter was drafted saying--quoting the committee report and the decision was made by the--rate people asked the legal people to ake that reference out of there for that last sentence.

"Q I show you a document which is stamped 00086 through 00087, which purports to be consolidated minutes of the conferences that you testified to.

"Did you participate in preparing those minutes?

"A No. Let me clarify that right away. After we finished our general conference with all the five departments, the conference broke up. The legals had their own little rump conference, commercial did, marketing did, rates did and we in the tax accounting did too.

"The rate people were really conscientious and prepared some minutes of their rump session. I was not there."

(continued on next page)

"Erickson

Now, your Honor, I am going to skip to page 34, line 5.

"Q Did you discuss this matter with Mr. Halpern, that is to say, the matters referred to in your memorandum stamped 00426?

"A Yes.

"Q When?

"A Probably shortly after I sent the memo in to him.

"Q Can you recall what the discussion was?

"A The discussion was solely related to the last paragraph, 'Have we done anything we can be criticized for?'

"Q Tell us what was said on the subject.

"A Well, merely -- we have of course -- AT&T is a big outfit and we do have department responsibilities and Mr. Halpern being rather new at the job just wanted to be sure that his rear was covered, in other words, that there was nothing that we in the tax accounting and I gratuitously brought our legals in on that because we worked quite closely together, and there was nothing that we were remiss on.

"Q And you assured them there was nothing in which you were remiss?

"A No, no.

"Q Pardon?

"A We had brought this up every time we could and that's all we can do.

"Q Did you assure him that your department had not been remiss?

"A I tried to.

"Q Do you recall anything else of that discussion with Mr. Halpern?

"A No."

That concludes what I am going to read at this time from Mr. Erickson's deposition, and I am going to offer, your Honor, Exhibits 205-A and 205-B, which are before you.

MR. STRUVE: Before you do that, would you please read page 43, line 24, to page 44, line 24, since that comes within the topic that you just covered.

MR. NICKERSON: That has nothing to do with the subject that I have been reading on. It's another subject. You are welcome to read it on your case. It has nothing to do with what I have read of Mr. Erickson's testimony.

THE COURT: I can't pass on it until I see it.

MR. NICKERSON: Will you give the Judge a copy of the deposition of Erickson, please?

THE COURT: What is the portion that Mr. Struve wants read?

MR. NICKERSON: From page 43, line 24 --

THE COURT: There has been testimony with respect

Draft A.

MR. NICKERSON: Not by this witness, your Honor.

THE COURT: Well, let's get it in. You may read it.

MR. NICKERSON: All right, your Honor.

Page 43, line 24.

"Q Was there any discussion of Centrex service in connection with draft A in which you were a participant and which you now recall?

"A Yes.

"Q Tell us what that was.

"A The draft A was very largely from our viewpoint at 195 controlled by Mr. Ferrall. The fact that did not cover Centrex was brought out at some point along the bit here.

"Q Along the what? I'm sorry, I couldn't hear that.

"A Along the discussion, during the discussion period and there were meetings held in Mr. Ferrall's office in which I participated or at least attended, at which Centrex was discussed.

"Q Can you recall the substance of what was said?"

Your Honor, I object to this answer. It is heresay as far as our clients are concerned.

THE COURT: Rather consistently from the start of the trial, Mr. Struve has objected that you have been reading a lot of hearsay material, and I have allowed it. Why should I make an exception now?

MR. NICKERSON: Because those admissions came from the mouths of his clients.

THE COURT: They are not admissions. Some may be. But there is a good deal of hearsay in the material I have allowed in, and I have said I will only pass on probative matter.

We will take the hearsay now, too.

MR. NICKERSON: Continuing on page 44, line 15:

"A The substance of what was said, as I recall it, that Mr. Ferrall was trying to sell the tax people in Washington on the idea that we could make an allocation and wasn't getting very far."

I move to strike that.

THE COURT: The motion is denied.

MR. NICKERSON: Is that what you wanted?

MR. STRUVE: Would you read the next two lines, please.

MR. NICKERSON: Very well.

"Q Do you recall his saying that?

"A Yes."

I move to strike that.

THE COURT: Motion denied.

MR. NICKERSON: Your Honor, I am moving to the deposition of Mr. Shepherd.

MR. STRUVE: Your Honor, I believe there is an offer pending of 205-A and 205-B. We do not object to the receipt of Exhibit 205B in evidence, but we point out that we cannot vouch for its accuracy. In fact, we vouch for its inaccuracy.

The telephone company described there is not one of the defendants. It is a telephone company that operates in the California area.

THE COURT: Well, it is referred to in the letter to Mr. Halpern, and there is a reference in the witness' testimony to the last sentence, to a portion of the article. That is the only portion that ought to be received.

MR. STRUVE: As to 205-A, your Honor, perhaps it is superfluous to object to it as hearsay, but we do.

Mr. Erickson testified that the reason for writing it years after the events in question was to assure his new boss that he was covered.

THE COURT: Well, isn't that a matter to argue at the proper time? I heard his testimony. He was trying to protect his boss' rear end -- I think that was the way he expressed it.

MP 6

You must assume that I am paying attention to what is coming into evidence here. Why do you assume I am not paying attention to it?

MR. STRUVE: I don't mean to, your Honor. I simply point out on the record that it is not only hearsay but extremely unreliable hearsay.

MR. NICKERSON: It goes without saying, your Honor, that just because I stay silent it does not mean that I agree.

It is a statement of an employee by stipulation within the scope of his employment about a matter within the scope of his employment, and therefore it is by definition not hearsay.

THE COURT: I wish you gentlemen would stop arguing and let's proceed with the case, and, hopefully, the case will be decided on the basis of evidence that is admissible and probative with respect to the basic issues.

MR. NICKERSON: I would like to read from the deposition of Mr. Shepherd. This is Mr. Scott Shepherd, your Honor, and I am starting at page 3, line 18.

"Q During the period January 1, 1964 through approximately May of 1966, did you serve as a Staff Representative in the Rate Planning Division of the AT&T Planning Department?

"A Yes.

"Q To whom did you report while you held the position of Staff Representative?

"A To Bob Weber and to Ken Picard.

"Q Were you the Staff Representative in the Rate Planning Division or were you a Staff Representative?

"A I was a Staff Representative.

"Q Can you tell us what your duties and responsibilities were as a Staff Representative in the Rate Planning Division?

"A I assisted in the preparation of speeches, did study work on customer attitudes toward rates, assisted in responding to questions from the Operating Companies on Centrex rates and various other projects.

"Q What was Mr. Picard's position?

"A I am not sure what the title was at that time, but he was a coordinate of Mr. Weber who was responsible for message total rates.

"Q Were you part of Bob Weber's group, as that term was often used within AT&T?

"A Yes, for part of the period that you talked about.

"Q During which part of the period of January 1, 1964 through May of 1966?

"A Until January of 1966.

"Q Did your position change as of January 1966?

MP 8 "Shepherd

"A Yes.

"Q In what way?

"A I reported then to Mr. Picard.

"Q You have said a moment ago that you assisted in answering questions from the Operating Companies with respect to Centrex. Was your contact with -- in terms of answering questions from the Operating Companies, limited to the subject of Centrex?

"A No, I wouldn't say it was.

"Q So you answered questions about other service offerings.

"A Yes, possibly.

"Q As Staff Representative, what duties did you have specifically with respect to Centrex service, aside from answering questions from the Operating Companies?

"A I assisted in the preparation of the rate letter for taking Centrex down to 100 stations and Centrex II.

"Q Were those letters sent out in approximately February of 1965, if you recall?

"A I don't have any recollection.

"Q Subsequent to the time that you served as a Staff Representative, what position did you hold until your present position?

"A In June of 1966 I returned to New Jersey Bell as a District Commercial Manager. In February of 1969 I became Division Commercial Manager of the Hudson Division of New Jersey Bell. In January, 1971 I believe it was, I returned to AT&T as Marketing Manager in Market Planning. When that organization was absorbed into the Corporate Planning Organization as a part of setting up a corporate planning organization I moved to Corporate Planning. Some time during the first quarter of 1974 I believe it was, I became a part of Administration C.

"Q Now, Mr. Shepherd, when you described your position in June of 1966, I believe you said you returned to New Jersey Bell?

"A Right.

"Q Had you come from New Jersey Bell prior to serving as Staff Representative?

"A Yes.

"Q During the period of 1971 to the end of 1972 when you returned to AT&T, did you have any functions with respect to Centrex service as Marketing Manager?

"A No.

"Q Now, Mr. Shepherd, I would like to show you a document which has the identification No. 03313 through 03314."

That is Exhibit 79, your Honor, Mr. Weber's letter, dated December 29, 1964, that went to approximately ten of the operating companies.

THE COURT: All right.

MR. NICKERSON: Continuing with the question at line 20:

"I will ask you first, have you ever seen this document before?

"A Yes, I have seen this before.

"Q Do you recall when you saw it?

"A In preparation for this deposition.

"Q Do you recall seeing it at any time prior to your preparation for this deposition?

"A No, I do not.

"Q During the period December 1964, did you have any duties or responsibilities in connection with Centrex service?

"THE WITNESS: Could you repeat the question, please.

"Q During December 1964, did your responsibilities as Staff Representative in the Rate Planning Division involve Centrex service?

"A Yes.

"Q During that time period, say December 1964 through early 1965, were you involved in answering questions from the Operating Companies with respect to Centrex service?

MP 11 "Shepherd

"A Yes.

"Q Do you recall during that time period, again late 1964, early 1965, any discussions with Operating Company employees with respect to whether or not Centrex rates should be split?

"MR. STRUVE: By split do you mean that the Centrex stations charges should be divided into charges for exchange access and intercommunication?

"MR. OBERMAN: Not necessarily limited to those terms which were later used, but divided so as to reflect a portion for the private communication segment of the Centrex station charge.

"A I think there probably was a discussion of that type. But I don't have a recollection of the exact period of time that you specified in your question.

"Q Do you recall having discussions with employees of the Operating Companies with respect to the subject of separating the Centrex station charge to break out a portion for private communication service?

"A At any time?

"Q At any time when you were a Staff Representative.

"A Yes.

"Q Do you recall approximately when?

"A I really can't recall when that was.

"Q Do you recall with which Operating Companies you had such discussions?

"A No.

"Q Do you recall whether or not these discussions were in person or not?

"A Some of them hay have been in person. I don't recall.

"Q Do you recall having telephone conversations with Operating Companies with respect to the subject?

"A Yes, I think I can recall that.

"Q Do you recall any particular companies with which you had contact?

"A No.

"Q Do you recall whether or not the Operating Companies asked you whether or not AT&T had a position on whether or not Centrex rates should be restructured?

"A Yes. I think the position was that they should not be restructured.

"Q When you say you think the position was they should not be restructured, is this something you communicated to the Operating Companies?

"A Yes.

"Q Do you know who was responsible for developing that position?

"A I am not sure who the ultimate decision might have rested with.

"Q Did it rest with you?

"A No.

"Q How was it communicated to you?

"A From Mr. Weber.

"Q Do you recall having a discussion with Mr. Weber about this subject?

"A No.

"Q Did Mr. Weber communicate to you this position in writing?

"A No.

"Q Do you recall whether or not Mr. Weber told you any reasons why this was the position of AT&T?

"A There were several reasons that were known to me. Whether they came out in the discussion with Mr. Weber, I am not sure.

"Q Can you tell us the reasons that were known to you?

"A First, and not necessarily in order of priority, was the desire to keep the selection of the serving equipment in the hands of the telephone company so as to be able to provide the service at the lowest revenue requirement.

"In other words, not to prove it in an uneconomic way. And this would vary from company to company.

"Secondly, was the desire for simplification of the rate structure. Those are the two primary reasons that come to mind.

"Q When you say providing service in an uneconomic way, are you speaking from the point of view of the Operating Companies as opposed to the customers?

"A I think the two are very closely related because if it costs the telephone company more to provide the service, ultimately it flows through to the customer."

Now, skipping to page 12, line 20:

"Q Do you recall whether Mr. Weber discussed with you in the period late 1964 through late 1965 any inquiries he w-s making of the Operating Companies with respect to the subject of this letter?

"A I don't recall that he did.

"Q Do you recall whether or not you received any correspondence, be it written or oral, from any of the Operating Companies in response to Mr. Weber's letter of December 29th?

"A It's entirely possible that someone might have called me. But I was not aware of the letter.

"Q You were not aware of the letter until your preparation for the deposition?

"A No.

"Q Do you recall whether or not Mr. Weber discussed with you the views of feelings of the Operating Companies with respect to the question of whether or not a Centrex restructuring should be undertaken in the period 1964 through 1965?

"A Yes, we discussed it.

"Q Can you recall specifically what those discussions were?

"A That it was impractical to do it.

"Q Did you discuss why it was impractical to do it?

"A For the reasons I previously cited.

"Q The reasons you are now referring to were those you gave in answer to the reason why AT&T's position was that the rates should not be separated?

"A Right.

"Q Is that true?

"A Yes. And particularly with respect to the difference between the Centrex CU where the trunks were provided to the customer and Centrex CO where there were no discrete trunks provided that we would split out.

"Q Just to make sure I understand you, when you say it was impractical with respect to Centrex CU and Centrex CO, are you stating that because Centrex CO was provided from the company's office as opposed to customer premises with trunks running to those customers' premises it was difficult to break out a trunk component or Centrex CO?

"MR. STRUVE: May I suggest that it might be preferable to let the witness state in his own words what he meant.

"Q Would you state whether my understanding is correct or restate it in your own words?

"A Well, in Centrex CU, the switching equipment is on the customer's premises and there are trunks running from that customer's premises to the central office and those discrete trunks which provide access to the network are readily identifiable.

"In Centrex CO each station is connected directly to the central office and there are no discrete trunks that can be identified which are providing access to the network.

"Q Can you take it a step further and tell us why it was, therefore, impractical to restructure the Centrex rates in view of this difference that you have now described?

"A The difference was that you could not split into discrete hardware in Centrex CO and if you split into discrete hardware in Centrex CU, you would create an uneconomic condition as far as the selection of the serving vehicle."

Skipping to page 18, line 14:

MP 17 "Shepherd

"Q . . . Do you recall any discussion with respect to whether or not AT&T, late 1964-1965 should recommend to the Operating Companies a change in the Centrex rate structure in order to accommodate a tax reduction?

"A I don't believe the discussion got to the point of whether or not we should make a recommendation for the consideration of the Operating Companies of splitting up the rate, because we were still wrestling with the problem of how it might be done.

"Q To the best of your recollection then, what did the discussions in these meetings to which you have referred involve?

"A Generally, the tone of the discussion was, "Is there some way that the rates can be split?'

"And our position, for the reasons previous stated, was that there was no way that it could be feasible. It was not feasible to split the rate.

"Q Do you recall at those meetings a decision being made then not to split the rates for Centrex service?

"MR. STRUVE: Objection.

"The witness' testimony was that the question of whether or not to recommend it never came up because their discussions indicated that it was not feasible.

"Q Would you answer my question?

MP 18 "Shepherd

"A I never attended a meeting where a decision of that nature was made."

Skipping now to page 21, line 18.

"Q Now, Mr. Shepherd, I have put before you a document which has the Nos. 00065 through 00074."

That is now Exhibit 108-B, your Honor, the agenda and participants in the 1965 October conferences.

THE COURT: Off the record --

(Discussion off the record.)

THE COURT: We will take our adjournment for the day.

(Adjourned to May 9, 1977 at 9:30 a.m.)

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DUPONT GLORE FORGAN INCORPORATED, et al.,

vs.

73 Civ. 2447

AMERICAN TELEPHONE & TELEGRAPH
COMPANY, et al.

New York, N. Y.
May 9, 1977 - 9:30 a.m.

- - -

(Trial continued.)

THE COURT: Proceed, please.

MR. NICKERSON: Your Honor, at the end of the day Friday, we were reading from Mr. Shepherd's deposition, if I might just put it in context. You recall he was in the rate department of AT&T, and that he was one of the individuals that Mr. Erickson testified told the operating companies that the AT&T rate should not be separated. That was at the October conference. And we heard him testify already that he was asked by some of the operating companies whether AT&T had a position on whether they should be separated, and he told them AT&T's position was that they should not be separated.

Now we are passing to page 21, line 18.

THE COURT: Go ahead.

MR. NICKERSON: (reading)

"Q Now, Mr. Shepherd, I have put before you a document which has the Nos. 00065 through 00074. Do you recall seeing that document before today?

"A Yes.

"Q When did you see it?

"A In preparation for this deposition.

"Q Apart from the preparation for this deposition, do you recall seeing this document?

"A I don't recall this specific document.

"Q The document makes reference to conferences on communications taxes in New York on October 6th and 7th and October 13th and 14th of 1965.

"Do you recall those conferences on communications taxes in 1965?

"A Yes.

"Q Do you recall attending the conference on any of those days, October 6th, 7th, 13th or 14th of 1965?

"A Yes.

"Q Which sessions did you attend, if you can recall?

"A I believe I attended all of them.

"Q Can you tell us how the conferences were organized in terms of panels, small sections, general group meetings, et cetera?

"A My recollection is that the first day was a panel and the second day split into groups according to specific areas of interest and then the group was brought together at the end for the wrap-up.

"Q During the first day, were there general presentations to everyone attending the conference?

"A Yes.

"Q Do you recall whether or not you served on the panel that spoke to the group at large?

"A I know I participated in one of them. My recollection is foggy as to whether I participated in both of them.

"Q Your name isn't mentioned on the agenda, while Mr. Weber's name is. Is it true that you, in effect, filled in for Mr. Weber at either one or both of these sessions?

"A Yes.

"Q So turning your attention to page 00072 where it indicates, for example, at two o'clock Mr. Weber was scheduled to be involved in a discussion of package pricing, marketing and rate viewpoints, did you, in effect, participate in that discussion for Mr. Weber?

"A Yes, I believe I did.

"Q Do you recall why you filled in for Mr. Weber?

"A None other than he was not available and I was his subordinate and sat in for him.

"Q Prior to the conference, did you speak with Mr. Weber about the scope of the presentation?

"A I don't recall that I did.

"Q Do you recall whether prior to the first day of the conference the panelists identified on page 00072 and 00073 met to coordinate their presentations?

"A I don't recall that they did.

"Q Do you recall being told in any respect what information you should impart to the Operating Companies to the other people present at the conference?

"A The general thrust of what I was to say was to address the subject of the application of the tax to telephone services and the rate and tariff aspects of it, including Centrex.

"Q Did you have any assistance in developing your remarks?

"A I don't recall.

"Q Did you personally read, for example, the text of the Act and supporting congressional reports to develop your presentation?

"A I recall having an opportunity to read the Act. But as far as the supporting congressional papers, I don't recall having seen those.

"Q To the best of your recollection, can you tell us what you said with respect to Centrex service to the group at large on the first day of the conference?

"Mr. Struve: I think to avoid confusion, the record should clearly reflect that there were two sessions of the conference, each of which certain Operating Companies were not represented and Mr. Shepherd addressed only one of those sessions.

"Mr. Oberman: I believe the witness indicated that he wasn't certain whether or not he addressed one or both of the sessions.

"Mr. Struve: No. The witness indicated he was not certain whether he attended both sessions, but he was certain that he addressed only one. Mr. Weber, as you recall from his testimony, addressed the other.

"Q Just so the record is absolutely clear, Mr. Shepherd, what is your best recollection with respect to your participation on these first day sessions of October 6th and 13th of 1965?

"A I recall participating in one of the sessions. I believe I attended both of them. But I only participated in one.

"Q To the best of your recollection, what do you recall having said on the subject of Centrex on that session in which you participated?

"A I don't recall in the first day saying anything specifically related to Centrex, other than how it might relate to a statement that the tax would be applied to services that provided access to the local exchange. Depending on how the descriptive material in the tariffs appeared accompanying the charges that were filed, if that descriptive material specified that the charge covered access to the local exchange or something comparable, then a tax would apply to that rate.

"Now, to the extent that this was the case in the unrestricted station charging Centrex, then that would have been applicable to Centrex.

"Q Do you recall whether or not you stated then with respect to unrestricted Centrex charges that the federal excise tax should continue to be collected on the entire unrestricted station charge?

"A Yes.

"Q Do you recall whether or not in that first day's presentation you discussed the considerations about which you have previously testified about the ability or practicalities of restructuring the Centrex station charges?

"A I don't recall the discussion on the first day. It is entirely possible, but I don't recall that that subject came up the first day.

"Q Apart from your own presentation on the first day of the session, do you recall whether or not any of the other panelists spoke to the subject of the effect of the 1965 Act on Centrex service?

"A I don't recall.

"Q Do you recall, for example, whether or not Mr. Erickson spoke to that subject?

"A I don't recall.

"Q Do you recall whether or not on this first day of the conference any of the Associated Company representatives had questions with respect to the effect of the Act on Centrex service?

"A I don't recall that they did. And I might add that if they had, I think the structure of the meeting was such that specific questions of that nature probably would have been deferred to the second day.

"Q You indicated before that on the second day the group was divided up into smaller groupings. Did you attend the second day subgrouping?

"A Yes, one of the subgroupings.

"Q Which subgrouping did you attend?

"A The rate and tariff subgrouping.

"Q Did you attend such meeting on the second day of each of the two weeks of the conference?

"A I am not sure that I did. I know I did on one of them.

"Q Do you recall approximately how many people attended that group on the second day that you recall attending?

"A This specific subgrouping on rates and tariffs, I think probably was maybe 12, 15 people in one corner of the room.

"Q Do you recall who attended that rate and tariff group meeting on behalf of AT&T?

"A Other than myself, I can't recall who else might have attended in the specific two-day meeting at which I was on the panel.

"In the other two-day session, I think Bob Weber would have attended the rate and tariff meeting.

"Q Do you recall him having attended the one at which you were present?

"A Yes.

"Q He also attended?

"A He did not attend the one where I participated in the panel. He was unavailable for both of those days.

"Q I am now directing your attention to the second day's session that you do recall attending. Was Mr. Weber also present?

"A No, he was not available for each one of those two days.

"Q So when you say approximately 12 people, 12 to 15 people attended, apart from you yourself they were from Operating Companies?

"A Yes.

"Q I would like to show you now a document which was produced in this litigation by Bell of Pennsylvania and carries the Nos. -- the identification Nos. 17092 through 17098 and which it states in handwriting at the top of the document 'Personal notes of G. J. Hartman-Originals were Handwritten.'

"Do you see that document before you now?

"A Yes.

"Q Do you know G. J. Hartman?

"A Yes.

"Q Can you identify him for us?

"A He was one of the people in Bell of Pa. with whom I had dealings on rate matters.

"Q Do you recall his position?

"A No, I don't. He was in the rate and tariff organization of Bell of Pa., but I don't know his specific title.

"Q Do you know where he is now, incidentally?

"A I believe he is still in Bell of Pa.

"Q Do you recall having any discussions with Mr. Hartman?

"A I have had a number of discussions over the years with Mr. Hartman.

"Q During the period 1964 through 1965, do you recall discussing the subject of Centrex service with Mr. Hartman, apart from the conference?

"A Yes.

"Q Can you tell us what those discussions involved?

"A Aspects of the Centrex offering and general questions that they might have, where they were seeking advice on Centrex. Although, you know, when I was helping them through the problems, there is no reason that they would necessarily accept the suggestions that I made. It was just helping them think through the problems they had related to Centrex.

"Q Do you recall whether or not Mr. Hartman attended the rate and tariff meeting on the second day of the conference?

"A Yes, I think he did.

"Q Incidentally, have you ever seen this document 17092 before today?

"A Yes.

"Q When did you see it?

"A In preparation for this deposition, within the last few weeks and then much earlier in the preparation stage for this deposition.

"Q Approximately how long ago was that?

"A I don't have specific recall of how long ago it was.

"Q Was it more than a week ago?

"A Yes.

"Q Did you read through this entire document?

"A I have read through it, yes."

Your Honor, I would like to put before you now Exhibit 110 for identification,and I would like to read from the stipulation as to documents. It is the document the witness has identified, and the paragraph 110 of the stipulation as to documents recites:

"The document entitled 'Bell System Conference on Excise Tax Law - Minutes of New York Meeting - October 6, 7, 1965,' and marked Exhibit 110, consists of a subsequent typewritten transcription of the contemporaneous notes made at various meetings during such conference by G. J. Hartman, rate supervisor - tariff administration of Pennsylvania Bell. The references in the notes to proper names are as follows."

I won't read all those, your Honor. They refer to the individuals in AT&T and identify them; also refer to two individuals in the operating companies. But that is set forth in paragraph 110 of that stipulation as to documents.

Now I will proceed with page 31, line 3, of Mr. Shepherd's deposition:

"Q Let me turn your attention to page 17096 which, from the face of the document, appears to be notes of a session on Thursday a.m. Is that correct?

"A Yes.

"Q Do you recall the discussion that occurred on the second day's session, the group session of the tariff and rate group with respect to Centrex?

"A Yes.

"Q To the best of your present recollection, and to the extent it has been refreshed by your review of Mr. Hartman's notes, can you tell us what that discussion was?

"A This part of the session was specifically addressed to the discussion of Centrex and that it was impractical to break up the rate on the unrestricted station.

"Q Do you know specifically whether there was give and take discussion between yourself and the operating people?

"A Yes, there was.

"Q Did anybody from the Operating Company make suggestions with respect to this problem?

"A Yes.

"Q Do you recall any of those discussions?

"A Some of them that are listed here.

"Q Which are you referring to?

"A No. 2, the difficulty for Centrex CO customers to understand the basis for trunk charges. Not sufficient time for filing tariffs for 1/1/66 effective date.

"It would just be conjecture to pick any others, I think.

"Q Do you recall whether or not any of the Operating Companies made a proposal or suggestion on how a private communication component for Centrex station charges could be derived?

"A I don't recall any company making such a recommendation or making such a suggestion.

"Q Do you recall whether or not any of the Operating Companies' representatives stated that their company wanted to restructure Centrex rates in order to effect a tax reduction?

"Mr. Struve: Objection. There has been no showing that any of the persons attending this meeting were at such level in their respective Operating Companies to be in a position to formulate or communicate a position on behalf of their company.

"Q Did you answer that question, Mr. Shepherd?

"A I don't know of anyone making such a recommendation. This was a meeting of implementers and we were in the process of, during the course of this meeting, of telling them how the tax would apply and helping them get the job under way to implement the tax. But this was not a policy kind of a meeting.

"Q So in other words, your function was to communicate to these representatives of the Operating Companies suggestions and recommendations with respect to the application of the tax?

"Mr. Struve: Objection.

"I think that question probably inadvertently covers more ground than it should. Are you asking about suggestions with respect to the application of the tax to existing rates, or are you talking about recommendations with respect to possible changes in Centrex rates in light of the tax?

"Mr. Oberman: Let me ask the witness how he would formulate.

"Q If this wasn't a policy making group, what was its function and what was your particular function?

"A The purpose of the meeting was to advise the people in the Operating Companies who would be involved in the work of applying this tax or changing the tax what the changes were that had to be undertaken and to answer any questions they had about the application of the tax to the existing service offerings.

"Q Mr. Hartman, or at least these notes which are identified as Mr. Hartman's notes, lists ten items under the words 'Break Out Trunk Charges - No.'

"Focusing your attention on those ten items which appear on page 17096, can you recall whether each of those items was in fact mentioned at the group conference for the rate and tariff group?

"Mr. Struve: I believe the record should reflect that when the witness answered your previous question regarding which of these items he could remember a discussion of, he was going down this list of ten items on page 17096.

"So I believe the witness has already given you his best recollection, which of these items he now specifically recalls being discussed.

"Mr. Oberman: With all respect, Mr. Struve, I remember the witness making reference to these in connection with a different question. But the question to which he was responding wasn't specifically what I have just raised. So that there is a possibility that his answer wasn't quite responsive to the question just posed.

"So I would ask the witness to answer whether or not he recalls a discussion of these ten items or any of them.

"A I don't recall specific discussions of all ten of these items.

"Q Do you recall, going down the list, a discussion that companies cannot break out Centrex CO, which is item 1?

"A Yes. That one I think was discussed.

"Q No. 2 -- I am paraphrasing -- it was difficult for Centrex CO customers to understand the basis for trunk charges.

"Do you recall that being discussed?

"Mr. Struve: The witness previously testified that he recalled that being discussed.

"A Yes, that one was discussed.

"Q Item 3 says tax factors introduced one more consideration resulting in customer pressure for either Centrex CO or Centrex CU.

"Was that discussed?

"A Yes, that was discussed.

"Q Is that the factor that you testified to earlier concerning the choice of serving methods?

"A Yes.

"Q Item 4, not sufficient time for filing tariff for 1/1/66 effective date. I believe before you indicated that that was discussed?

"A That probably was discussed.

"Q Do you recall whether or not there was any discussion of approximately how long it would take to file tariffs, restructuring Centrex rates?

"A No, I do not.

"Q Item 5 states: 'Break out of Centrex CU only weakens 'the Centrex offering' concept.

"Do you recall any discussion of that?

"A Only as it might have been related to item 3.

"Q Again, the choice of serving methods?

"A I think that is the consideration, yes."

(Continued on next page)

"Q Was the concern, Mr. Shepherd, that Centrex remain a unitary offering?

"A Yes.

"Q Item 6 states tax applies in 14 percent of customer's total billing on PBX.

"Do you recall any discussion of that?

"A No.

"Q Item 7 states preferential treatment for large customers. Then I believe it says why not break 1B and 1% service between line charge and station charge.

"Do you see that language?

"A Yes.

"Q Do you recall any discussion of it?

"A No.

"Q Item B reads customers three percent tax flows through to bottom line where he pays only one and one half percent of the other taxes.

"Do you see that language?

"A Yes.

"Q Do you recall any discussion of that subject?

"A No.

"Q Item 9 reads: "We should not structure notes on temporary tax considerations.

"Do you recall any discussion about that? Let me ask you at the same time if the word 'notes' should read the word 'rates'? Do you recall any discussion of the subject that we should not restructure rates on temporary tax considerations?

"A There was a discussion of that in the context that it was our feeling that the tax was going to be eliminated very shortly and that, therefore, it was unwarranted, indeed impossible as we saw it to split the rate.

"Q Item 10 states about 1,000 Centrex systems in service.

"Do you recall discussing the number of Centrex service?

"A I don't recall.

"Q Do you recall from your own recollection approximately how many Centrex systems were in service in the period 1964 through 1965?

"A I don't recall.

"Q Do you recall whether in the period 1964 through 1965 there were more Centrex CO systems or more Centrex CU systems?

"A I have no idea.

"Q The following paragraphs after the ten items which we have just gone through reads under the heading: "Difference in Tariff filings for CTX.' "

MP 3 "Shepherd

It is stipulated that CTX means Centrex, your Honor, in the stipulation of documents.

"'In those instances where the differential between CTX CO and CTX CU is stated separately, it is recommended by AT&T that this differential be considered taxable in order to maintain uniform treatment with those companies who have included the differential in a single CTX CO charge.'

"Do you see that language on 17096?

"A Yes.

"Q Do you recall any discussion of this subject?

"A I don't specifically recall it. But it may have been discussed.

"Q Where Mr. Hartman or these notes say it is recommended by AT&T, do you recall specifically stating a position with respect to the differential between Centrex CO and Centrex CU?

"A No, I don't recall a specific recommendation that was made at that time. Although it would appear consistent with the application of tax on other things.

"Q Does a reading of that paragraph which I have just reviewed with you refresh your recollection in any respect about discussions you had outside this particular meeting on the tax treatment of the differential for Centrex CO?

MP 4 "Shepherd

"A No, it does not.

"Q That paragraph includes the phrase, to maintain uniform treatment with those companies who have included the differential in a single Centrex CO charge.

"Do you recall at that meeting any discussion of the concern to maintain uniform treatment?

"MR. STRUVE: You mean uniform application of the precise tax of Centrex or what did you mean?

"MR. OBERMAN: Let's take it that way.

"Q The uniform application of the excise tax to Centrex service.

"A I think in any of the discussions of the application of the tax we would want to have uniform treatment.

"Q You recall that being a subject of discussion at that particular meeting?

"A Not specifically as it related to this item, but I think in the application of the tax for all services this would be a consideration.

"Q Let me now show you a document which has been identified with Nos. 00086 through 00087 and ask you first have you ever seen that document before?

"A Yes.

"Q When did you see it?

"A In the preparation for this deposition and at the time it was prepared.

"Q Did you prepare this document?

"A I believe I did.

"Q Do you know to whom it was sent, if anyone?

"A It was, I believe, sent to those who attended the meeting who had attended the rate and tariff subgroup session.

"Q Did this document represent your attempt to summarize the discussions of those rate and tariff group meetings of October 7th and 14th?

"A Yes.

"Q Did you discuss with Mr. Weber what occurred at the second week's meeting?

"A I may have, but I don't recall a specific discussion. But I believe I attended the meeting anyway as an observer. I attended the meeting as an observer where I was not the active participant.

"Q The third item on that page refers to tax status of Centrex systems and it states:

> "'Centrex systems should be accorded the same tax treatment as PBX systems with the single exception of charges for Unrestricted Centrex stations which are taxed.'

"Do you see that language?

"Shepherd

"A Yes.

"Q Do you recall whether that statement was made in words or substance at the two meetings of October 7th and 14th?

"A Yes. The substance of that would have been stated at the meeting.

"Q Do you recall that it, in fact, was stated at the meeting?

"A Yes -- not those specific words --

"Q No, in substance.

"A In substance, yes."

Your Honor, I am now going to offer Exhibit 110, and, as I offer it, your Honor, I would like to direct your attention to Attachment C of the stipulation of facts and particularly the fourth column of it, if you have that before you.

THE COURT: Attachment C?

MR. NICKERSON: Yes. Attachment C, your Honor.

You will recall that that is a description, at least in part, of the initial Centrex tariffs, and you will see the fourth column has the heading, "Higher Station Rate for CO than for CU'.

THE COURT: Yes.

MR. NICKERSON: On some of them it says "Yes" and on some of them it says "No".

Where it says "No", if you would refer to Footnote 6, it says, "Identical unrestricted station charges for Centrex CO and Centrex CU, with an additional charge for station for Centrex CO," so that, in other words, you recall Mr. Struve told you yesterday -- and it is in the evidence -- that Centrex CO and CU had a slightly different charge, the differential being for power and space --

THE COURT: On the company premises.

MR. NICKERSON: On the company premises.

So that, your Honor, is what is referred to in the notes of Mr. Hartman on page 17096, about three-quarters of the way down, of the differential between Centrex CO and CU, and if I might read that paragraph, your Honor, which I draw your attention to, it reads:

> "In those instances where the differential between Centrex CO and Centrex CU is stated separately, it is recommended by AT&T that this differential be considered taxable in order to maintain uniform treatment with those companies who have included the differential in a single Centrex CO charge."

Now, your Honor will remember, if you will look at Exhibit 108-A, at the page of Exhibit 108-A stamped 14825, the section which is marked 2.10, under the heading, "Charges for other than Communication Services" -- if you will look down to Item D on that, 2.10 reads:

"Charges by telephone companies for other than communication services are not subject to tax. Examples of such charges are:" --

Then, if you go down to D, it says, "Rent of Floor Space."

I offer Exhibit 110, your Honor.

MR. STRUVE: Your Honor, before you rule on that, may I respond briefly to the point made by Mr. Nickerson of the applicability of the additional charge for the Centrex station.

That charge was not a charge for rental of floor space. If a Centrex subscriber had gone to the door of the telephone building to see the space rented, he would not have been admitted to the building, any more than anyone else would.

The charge was stated in the tariff for communication service, and at the time we are talking about it was for exchange access service, so it was properly taxable.

With respect to the admissibility of Exhibit 110, our position is the same as it was with respect to the notes of the May 1961 meeting, which were Exhibits 15, 16 and 17. As stated on the first page of Exhibit 110, these were the

MP 9

personal notes of someone who attended the conference, which were not even typed up in readable form until after this action was begun, and they were discovered in his files. There is no indication that he took these notes for anyone else to read. There is no indication to what extent the notes reflect what someone else said as opposed to his own reaction, and in particular on page 17096, from which Mr. Nickerson just read, about which Mr. Shepherd was questioned at some length, there is no attribution of any comment to any specific person.

We submit that 110 is hearsay. We submit that the probative testimony and the other probative evidence in the case is the testimony of Mr. Shepherd and the others.

THE COURT: I agree with you. The evidence is the testimony of Mr. Shepherd, and the notes were to refresh his recollection. They may not be offered on behalf of the person whose recollection is refreshed, but the opposing side may offer them -- that would be you in this case, Mr. Struve -- for the purpose of contradicting anything that the witness may have testified to in his direct examination.

MR. NICKERSON: I perhaps should have added, too, your Honor --

THE COURT: We won't have any further discussion. It is perfectly clear that the evidence in the case is the testimony of Mr. Shepherd. This memorandum was simply used by him to refresh his recollection to the extent he could as to what transpired at that conference.

MR. NICKERSON: Your Honor, it is stipulated that that document was prepared by Mr. Hartman during the existence of his employment relationship, that it was made during the existence of that relationship, and it was concerned with matters within the scope of his employment.

THE COURT: That doesn't make it evidential.

Testimony, I repeat, is that of a witness, and the witness simply used that to refresh his recollection, to the extent that it could refresh his recollection.

MR. NICKERSON: I offer it under Section 801 as, in my judgment, an admissible statement.

THE COURT: Well, let's move on, please. We are spending a lot of time on these matters. I have repeatedly stated the Court's position in this regard since the beginning in a non-jury case.

MR. NICKERSON: Starting from Mr. Weber's testimony at page --

THE COURT: You read from his deposition last week.

MR. NICKERSON: That is right, your Honor, and I am going back to it, to that portion of it where he addressed what went on at the conferences.

Do you have that, your Honor?

THE COURT: All right.

MR. NICKERSON: At page 72, line 17:

"Q I will show you a document which has been stamped 00065 through 00083. It relates to conferences on communications taxes in October of 1965.

"Have you seen this document before?"

That is Exhibit 108B, your Honor, the agenda of the conferences of October 1965.

"A I have.

"Q When did you first see it?

"A I saw it about the same time the document was prepared.

"Q Did you attend those conferences of October 6 and 7 and October 13 and 14, 1965?

"A Yes, I did.

"Q Let's turn to the agenda which is page stamped 00072.

"Can you recall what you said in the 9:20 segment with respect to rates where your name appears on page 00072?

"A I have no specific recollection.

"Q Do you have any general recollection?

"A My participation in this meeting was not limited

MP 12 "Weber

to our concern over Centrex alone. My responsibilities at this time included all exchange rates: residence, business, PBX trunk rates; not PBX systems, but PBX trunks; Centrex and a variety of other services, such as were provided to hotels and coin users and so forth.

"I must assume that within the context of the title of that portion of the agenda, Outlines of Departmental Concerns, my remarks were rather broad and general and encompassed that whole array of responsibilities.

"Q Did you write out your remarks?

"A No, I don't recall doing that.

"Q Let's turn to the 2:00 o'clock 'Special Problems - Package Pricing; Marketing and Rate viewpoints'.

"Do you see that item?

"A I do.

"Q It indicates three speakers, Mr. Schultz, I think that is --

"A Yes.

"Q -- Mr. Conley and yourself.

"Can you recall what you said in that segment of the agenda?

"A I don't have a specific recollection, but, again, within the context of the title of that portion of the agenda, my own remarks probably described the application

MP 13 "Weber

of tax -- of the excise tax -- to Centrex service, among other things.

"Q What did you say about that?

"A I merely described that the tax would apply on unrestricted Centrex stations, would not apply on restricted stations or consoles, I believe, or certain other elements of supplemental equipment associated with Centrex.

"Q Was there any discussion by you at those conferences of the question of whether Centrex rates should or should not be split?

"A I have no specific recollection.

"Q Do you have a recollection that that was not discussed?

"A No, I don't.

"Q Do you have any recollection of whether anyone else discussed that question?

"A I have a recollection that Mr. Shepherd, who worked for me at the time, attended those meetings, but I don't recall whether he discussed this subject or not.

"Q Were you present while Mr. Shepherd was also present?

"A Some of the time, yes.

"Q Do you recall any operating company raising the question as those conferences as to whether or not Centrex

MP 14 "Weber

rates should be separated?

"A I have no direct recollection from that period. Mr. Struve showed me a document which purported to be some notes taken by someone at that meeting which indicated, I believe, that there was some discussion, but I don't recall it.

"Q Whose notes were those?

"A I believe they were Mr. Shepherd's."

Now, going to page 77:

"MR. STRUVE: . . . Is this what you are referring to, Mr. Weber?

THE WITNESS: Exactly, yes.

"Q You are referring to document 00084, the identity of which we have extracted from Mr. Struve.

"MR. STRUVE: May I object to those remarks.

"Q Do you know whether those notes were made by Mr. Shepherd?

"A I don't know from any personal recollection at the time. I was under the impression that he had acquired them, but I don't know whether he wrote them himself or not.

"Q Are those minutes, if you know, of the conference on communications taxes conferences on communications taxes referred to on page 00065?"

That is Exhibit 108-B, your Honor.

MP 15 "Weber

"A From the title at the top of 00084, I must assume that they relate to those meetings.

"Q Were there separate meetings for the rate representatives?

"A My recollection is that there were two series of two-day meetings. Some of the Bell operating companies were represented at one such series on the 6th and 7th, other Bell companies attended meetings of the 13th and 14th. A portion of those meetings were general in nature and all participants attended a common meeting.

"There were other sessions during the course of the two-day meeting which were limited to specific departmental interests and only those people who had such interest attended those, call them sub-meetings.

"Q Did you attend those sub-meetings for rate representatives?

"A I recall attending at least one. Whether I attended both, I am not sure.

"Q Was there any discussion at those sub-meetings with respect to whether or not Centrex rates should be separated?

"A As I stated earlier, I don't recall any specific discussion.

"Q Do you recall stating, in words or substance, at any time in these conferences or sub-meetings in October of 1965, that AT&T would not recommend the separation of Centrex rates?

"A I don't recall that a specific statement of that nature was made.

"Q Was a general statement of that nature made?

"A I don't recall such a statement.

"Q Was a general statement made at any of those conferences or sub-meetings in October of 1965 that AT&T would recommend that the Centrex rates not be separated?

"A I don't recall a question of separation being discussed.

"Q Was this question of the application of federal excise tax to the intercommunication portion of Centrex rates discussed in the October conferences or sub-meetings?

"A I certainly recall that the recommended application -- I should not use the word recommended -- that the appropriate application of tax with respect to Centrex service was described in some detail.

"I do not recall that there was any discussion of any alternatives that might have been discussed earlier prior to the enactment of the legislation.

"Q By that you are referring to discussions with respect to your letter of December 29, 1964?

"A Yes, that's right.

"Q Was there any discussion at the October conferences or sub-meetings of your letter of December 29, 1964?

"A I recall no such discussions.

"Q Or of the responses?

"A I do not recall that.

"Q Was there any discussion at the October conferences or sub-meetings of the possible solution that you referred to in your letter of December 29, 1964?

"A I do not recall any discussion of that.

"Q Do you recall that such a discussion did not take place?

"A No, I don't."

Now, skipping to page 81, line 13:

"Q Did any of the operating companies suggest at any time during the October conferences or sub-meetings that some way should be found to obtain a tax break for the Centrex customer?

"A I don't recall such a discussion.

"Q Do you recall that such a suggestion was not made?

"A No, I don't."

Passing to page 87, line 11:

"Q After the passage of the act in 1965, up through the time that you still had anything to do with Centrex, did you have any discussions with any of the operating companies with respect to complaints or questions raised by their customers with respect to the federal excise tax on Centrex service?

"A I recall that certain companies had brought to our attention the fact that some of their customers had questioned this particular application of the tax on Centrex service and in view of that situation, the companies occasionally would call us to ask what our position was or whether there had been any change in the position which they understood was the case.

"Q When did they first understand that that was your position?

"A I can't speak for any particular company. Certainly in the course of discussions with some of the companies in January and February 1965 when they responded by telephone to my letter, the general view of our company was expressed at that time.

"Certainly, it was presented to all the Bell companies during the series of meetings held in October of 1965.

"Q Your position was?

"A That we were not planning to recommend that there be any change in the Centrex rate structure.

"Q At what point in the agenda, which is document page 00072, were they informed of that?"

Skipping down to line 21:

"A I don't recall the amount of details that we discussed in the 9:20 a.m. portion of the presentation, however, in the 2:00 o'clock presentation, I am quite certain that we described very carefully the application of the tax to Centrex service.

"I think implicitly in that description it was quite apparent that there was no restructuring being recommended.

"Q I might have forgotten to ask you about page 00073, the item which is headed 'Wrap Up and Discussion of Departmental Responsibilities.'

"Do you recall any discussion that you had at that point in the agenda?

"A I have no recollection of that portion.

"Q Going back to your discussions that you referred to with operating companies after the Excise Tax Reduction Act of 1965 went into effect, can you recall which companies those were that you had discussions with?

"A I have a recollection that I had a discussion with Southwestern Bell.

"Q Can you recall the substance of it?

"A My best recollection is that the rate coordinate of mine in Southwestern had been queried by his marketing coordinate in Southwestern Bell regarding inquiry, complaint, whatever you want to call it, from one or more customers regarding the application of the tax to Centrex service.

"At that time, and I can't be specific as to the time when this occurred, but at that time, whenever it was, he called merely to reaffirm his understanding of what our recommendation was in this area.

"Q Can you recall that conversation with him? What was his name, first?

"A My best recollection is that it was a man by the name of Gene Arnold.

"Q Tell us, to the best of your recollection, what that conversation was with Mr. Arnold.

"A Again, without being able to recall a specific date or even the --

"Q Can you recall the time of year?

"A The time frame -- my best guess is that it was 1966, but it is that vague that I am not even absolutely certain of that. It was subsequent to the enactment of the law and certainly prior to the transwer of my responsibilities in Centrex to Mr. Kemp.

"However, apparently there had been questions raised by one or more customers in the Southwestern Bell area regarding this and Mr. Arnold called and inquired as to whether or not our position had been or our position was any different than what he understood it to be, namely, that we were not recommending a change in the Centrex structure.

"I don't recall any more than that.

"Q Do you recall your response?

"A My response certainly was that we were not at that time planning to make any different recommendation than we had made at the meeting in October or at any time, for that matter.

"I am going back. Any other time. I am referring to the discussion that might have been held in January or February of '65 when we discussed my memorandum or my letter.

"Q Let me show you this document which is 03319. I am not sure, but I think this comes from Southwestern Bell's files. It refers to, I believe it refers to a conversation between you and Mr. Erickson.

"A Yes.

"Q Do you recall any conversations in or around 1967 with respect to Monsanto?

"A I have a recollection that one of the customers in, I am not even sure if there was more than one, but at least one of the customers that had questioned Southwestern Bell about the tax was Monsanto.

"Q Who was your predecessor in your job as exchange rate supervisor?

"A A man by the name of McKeage.

"Q In March of 1966 did you learn that the excise tax on the communications services had been increased from three to ten percent?

"A I don't recall that such a discussion was held.

"Q Did that increase in the tax cause you to focus on whether your recommendation should be changed?

"MR. STRUVE: Objection on the ground that there is no testimony in the record that there was a recommendation at this time. The testimony shows simply that there was no recommendation to restructure.

"Q Would you answer my question, please?

"A Would you read the question back, please.

"(Record read.)

"A There had been no recommendation made to the Bell companies with respect to any change in Centrex rates.

"Weber

"Q In your conversations subsequent to your letter of December 29, 1964, did you not talk to the operating companies as to whether or not they should separate the rates?

"A I think it is one thing to make a positive recommendation. It is something other than that to merely say that things are as they are and until something happens, we live with rates as they are."

MR. STRUVE: Mr. Nickerson, would you please read lines 7 through 9 on page 93?

MR. NICKERSON: Certainly:

"Q You said, 'We live with rates as they are' to them?

"A Not in those words, obviously.

"Q The substance of them?

"Mr. Struve: Would you please let the witness complete his answer, Mr. Nickerson?

"Q Had you finished?

"A I think so."

Going to page 94, line 11

[illegible] When Mr. Kemp took over the responsibilities from you with respect to Centrex service, did you fill him in as to pending problems and considerations with respect to Centrex?

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"A I am sure I did at the time.

"Q Did you fill him in with respect to the position of AT&T with respect to whether or not Centrex rates should be separated?

"A I am sure I did.

"Q What, in substance, did you tell him?

"A That no recommendation had been made to the Bell companies to modify Centrex rate structure to accommodate changes in the excise tax law.

"Q Did you tell him of your conversations with the Bell companies subsequent to your letter of December 29, 1964?

"A I am not -- I don't recall that I had specific conversations relating to that particular letter or those particular discussions, but I believe that I told him that the matter of the application of the tax had been reviewed with the Bell companies, but without any specific reference as to when or what.

"Q Did you tell Mr. Kemp, in words or substance, the reasons why you believe that the Centrex rates should not be separated?

"A I don't recall that I did.

"Q Did you discuss with Mr. Kemp the Southwestern Bell matter which took place apparently on or about the

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time that you turned over those responsibilities to Mr. Kemp?

"A I don't recall discussing that specific case with him.

"Q Do you recall discussing generally with him that you had had such inquiries from one or more of the Bell operating companies?

"A I believe there was a general discussion of all matters of interest, current interest involving Centrex and one of those was the concern over some customers about the application of tax to Centrex service.

"Q Do you recall anything that you said in that respect to Mr. Kemp?

"A Nothing more than what I have already put into the record."

MR. NICKERSON: Now, your Honor, I would like to offer Exhibit 114A. The stipulation of documents recites that this letter was sent by R. N. Flint, Assistant Comptroller of AT&T, to the comptrollers of all of the defendant operating companies, and that attached to the letter were parts 1 through 5 and appendices A and B of the manual entitled "Federal Excise Tax on Communications Services."

That is simply to show that after the conference, your Honor, they forwarded to them an extensive revision of the manual. I won't burden you with the whole manual.

Now, your Honor, I am passing to a new subject, which is --

THE COURT: Are you offering 114A for admission in evidence?

MR. NICKERSON: I am, your Honor.

MR. STRUVE: We don't see its relevance but we don't object.

THE COURT: It may be marked.

(Plaintiffs' Exhibit 114A was received in evidence)

MR. NICKERSON: Your Honor, now I am passing to a new subject. This is the period after the Act was passed and after these conferences, and the subject matter is the complaints that came from various of the customers, the first of which is Monsanto.

THE COURT: There is a reference already to Monsanto's complaint in Mr. Weber's testimony.

MR.NICKERSON: Yes, there is, your Honor, and now I am going to put in the documents.

First I offer Exhibits 132, 133 and 135 as a

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group.

The stipulation as to documents recites with respect to Exhibit 132 that that exhibit was sent by the General Commercial Manager, St. Louis, of Southwestern Bell to the Commercial Operations Engineer, St. Louis, and General Merchandising Manager, St. Louis, of Southwestern Bell.

Your Honor, with respect to all of these three documents it is stipulated that all of these documents were prepared by the person who prepared and sent them during the existence of the employment relationship, and that they were concerned with matters within the scope of employment of those officials.

This is simply a recognition of the complaint of Monsanto. Exhibit 133 is that Southwestern Bell vested it with AT&T coordinates. Exhibit 135 reports on the discussion with AT&T coordinates, that the entire Bell System associated companies charged for Centrex in the same manner and that AT&T does not feel the climate is right to try to get the tax law changes, which is the only way the tax could be eliminated.

So, I offer those three.

I may say there is no objection to the --

THE COURT: I am trying to read this, if you don't mind.

MR. NICKERSON: Excuse me, your Honor.

(Pause)

MR. NICKERSON: I may say there is no objection to these under the pretrial order, your Honor.

MR. STRUVE: As to Exhibits 132 and 133, we have no objection to their admission as to Southwestern Bell, but we don't see their relevance.

Apparently plaintiffs are not offering Exhibit 131, which is the actual --

THE COURT: Where is 131? I don't see that.

MR. NICKERSON: I will be glad to put that in, your Honor. I was trying to shorten this for you.

MR. STRUVE: It seems to me that Exhibit 131 is the best evidence of what Monsanto said, and Exhibits 132 and 133 are merely internal Southwestern Bell covering memoranda which are of no relevance to this action.

MR. NICKERSON: I will offer 131, your Honor, too.

THE COURT: How about 135? On what basis can you object to 135?

MR. STRUVE: As to 135, we have no objection to its admission as to Southwestern Bell. Insofar as it attributes statements to anyone at AT&T, which is not clear, such statements obviously are hearsay and we object to them on that ground.

THE COURT: It may be received.

MR. NICKERSON: These also go to the conspiracy count, your Honor.

THE COURT: I was going to say that they are received subject to connection on the conspiracy count.

MR. NICKERSON: Now I will offer Exhibit 136, your Honor.

THE COURT: Incidentally, 131 is also received. That is 131, 132, 133 and 135; all received.

(Plaintiffs' Exhibits 131, 132, 133 and 135 were received in evidence)

MR. NICKERSON: Now I offer Exhibit 136, your Honor; and in particular draw your attention to the third paragraph.

MR. STRUVE: We have no objection to the receipt of 136 as to AT&T, but we would like to note for the record that insofar as it attributes specific statements to Mr. Weber, of course it is hearsay. Mr. Weber testified at great length, and your Honor has heard his testimony, concerning the consideration that was given to this question at AT&T in 1964 and 1965.

MR. NICKERSON: Your Honor, there is no reservation in the pretrial order, as there is for other documents, of an objection as to hearsay. The pretrial order says that all objections which are not noted are waived.

MR. STRUVE: In the pretrial order we stated we had no objection, upon the understanding that it was not being offered for the truth of any statement made therein and --

THE COURT: Well, that is different.

MR. STRUVE: We have just stated that, as to that statement, we object to its receipt for the truth on the ground of hearsay.

MR. NICKERSON: It is totally useless, your Honor, then, to put in a whole bunch of hearsay objections, as they did, in the pretrial order.

THE COURT: It certainly is admissible under the conspiracy count subject to connection. It is a statement by Weber with respect to discussions had with other companies who are defendants and who are charged with being conspirators. It is received subject to connection.

(Plaintiffs' Exhibit 136 was received in evidence)

MR. NICKERSON: Now, your Honor, I offer Exhibit 137 --

THE COURT: Moreover, Mr. Weber's testimony indicates there had been a general discussion at that meeting. Frankly, I am at a loss sometimes to understand some of the objections that are made in this case.

MR. NICKERSON: I offer this in particular, your Honor, for the second --

THE COURT: Just to make that point clear, give me that Exhibit 135, please.

(Handed to the Court)

THE COURT: Are you challenging, for example, the statement "The comptroller's organization has talked to AT&T and we have also discussed this with our AT&T coordinates," Mr. Struve?

If you are, it sounds like we are dealing with a mirage in this case. I think we ought to get down to the issues and let us move forward on it.

MR. NICKERSON: Your Honor, I have offered 137.

THE COURT: 137 may be received.

(Plaintiffs' Exhibit 137 was received in evidence)

MR. NICKERSON: Now, your Honor, I offer Exhibit 142. The stipulation as to documents reads:

"The original of the letter dated August 4, 1967, marked Exhibit 142, was sent by H. W. Engelmann" -- who has been identified as the account manager in Southwest Bell -- "to E. J. Renfro" -- Monsanto. "The handwriting on the bottom right of the page is apparently Engelmann's and apparently reads: 'Call from chief attorney - explained we could do nothing at this time - suggested he contact tax people [word illegible] to have law changed. H. L. E.'"

MR. STRUVE: No objection to its receipt as to Southwestern Bell.

(Plaintiffs' Exhibit 142 was received in evidence)

MR. STRUVE: I would like to suggest that, on the grounds of completeness, Exhibit 141 should also be in the record, because that exhibit, which plaintiffs have not offered, reflects the ultimate conclusions reached by Southwestern Bell on this question.

THE COURT: Where is 141, who has it?

MR. NICKERSON: I have no objection to that, wcrll "Weber

your Honor.

THE COURT: Offer 141.

MR. NICKERSON: I will offer it.

THE COURT: Now, who is H. E. Jones, General Merchandising Manager? Is he the General Merchandising Manager for Southwestern?

MR. NICKERSON: Your Honor, it is stipulated,with respect to that, that he is General Merchandisg Manager of Southwestern Bell and that it was sent --

THE COURT: And this was sent to the General Commercial Manager?

MR. NICKERSON: St. Louis, of Southwestern Bell.

(Plaintiffs' Exhibit 141 was received in evidence)

MR. NICKERSON: Your Honor, if we are going to put that one in, I think we also should put in, for the sake of completeness, Exhibit 138, which I will offer, which is a memorandum sent by William O. Douglass, District Sales & Service Manager in Southwest Bell, to the Division Sales & Service Manager, East Sales, of Southwest Bell.

MR. STRUVE: Again, no objection to its receipt as to Southwestern Bell, but we fail to see its

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relevance. This is simply another internal memo transmitting another inquiry to the same effect made by Monsanto in a different sales division of Southwestern Bell.

THE COURT: In this instance this will be received only as against Southwestern Bell.

(Plaintiffs' Exhibit 138 was received in evidence)

MR. NICKERSON: Your Honor, now I am going to move to Union Carbide, and first I offer Exhibits 125A and B. These, your Honor, the memoranda dated June 8, 1966, and June 10, 1966, marked Exhibit 125A, were sent by Mrs. Marion C. Mallory, attorney for New York Telephone, specifically to E. R. Charvat, whom you have heard of, tax attorney in the General Tax Attorney's Office of AT&T, and R. C. Hamer, in the sales department of New York Telephone, an account manager for Union Carbide.

THE COURT: Who sent the letter? Marion who?

MR. NICKERSON: C. Mallory, an attorney in the New York Telephone Company, sent the memoranda.

Attached to each of the memoranda was a typewritten portion of the draft which is Exhibit 125B.

The point of this, your Honor, to orient you: You will recall that there was testimony by Mr. Erickson that they left out, in responses to customers, that portion of the House Committee Report which said -- it is quoted in here -- "Until such a separation is made, this exemption will not apply to Centrex." They left out eventually the language which is quoted.

THE COURT: What page?

MR. NICKERSON: On page 06434 of Exhibit 125B.

It also shows, your Honor, that they consulted with AT&T, that is, New York Telephone consulted with AT&T about this.

THE COURT: This copy is rather difficult to read.

MR. NICKERSON: That is the best copy that we got from their files, your honor.

I think the significant part, your Honor, that I would suggest you need to know now is that in the draft, on the last page of the draft, Exhibit 125B, is quoted the language of the Committee Report, And, as you will see in a moment, Mr. Weber suggested that that be taken out of the draft.

THE COURT: Where has he suggested it be

taken out?

MR. NICKERSON: I am about to tell you, your Honor.

I now will offer Exhibits 126 and 127.

126 is a memorandum sent by Mr. Charvat, who received the draft, to Mr. Weber, with a copy to Mrs. Mallory, and 127 is Mr. Charvat's response to Mrs. Mallory. And the second paragraph of Exhibit 127 recites his discussion with Mr. Weber.

THE COURT: What do page 06429 and page 06430 represent? Is that the corrected --

MR. NICKERSON: That is simply the draft. You will see the initials up at the top, E. R. C., Ernest Charvat. That is his draft that he sent back to Mrs. Mallory. I think, if you compare that with some of the handwriting, it may comport with it, though I am not sure about that, your Honor. Perhaps I shouldn't have stated that.

THE COURT: All right.

MR. STRUVE: We don't object to the receipt of 125A and B, 126 and 127 as to AT&T and New York Telephone.

THE COURT: It may be received as to New York Telephone Company without reservation, but subject to connection with respect to the other defendants, except it should also be received as to American Telephone & Telegraph Company without reservation. Why should it not?

MR. STRUVE: I so stated, your Honor.

(Plaintiffs' Exhibits 125A, 125B, 126 and 127 were received in evidence)

MR. NICKERSON: Now, your Honor, I offer Exhibit 128, and the stipulation of documents says that this memorandum dated June 22, 1966, with the attached draft dated June 20, 1966, was sent by Mrs. Mallory, attorney for New York Telephone Company, to C. A. Daley, W. B. Garvey, E. H. Munz, respectively, a General Rate Engineer, General Revenue Requirements supervisor and General Marketing Engineer of New York Telephone.

I would also offer at the same time, which I guess would make more sense, Exhibits 129 and 130. Then you have the whole package before you.

THE COURT: Is that with respect to Union Carbide?

MR. NICKERSON: Yes. And I would like to read, if I may, your Honor, the stipulation of documents as to Exhibit 129 when you get to it.

THE COURT: All right.

MR. NICKERSON: The stipulation of documents, in paragraph 129, recites as to Exhibit 129: "The memorandum dated June 24, 1966, and marked Exhibit 129, was sent by E. H. Munz, General Marketing Engineer of New York Tel, to Marion C. Mallory. The handwriting reading 'Mr. Garvey thinks letter o.k. as presented to him 6/27,' is apparently that of Marion C. Mallory. The handwiting reading 'Talk to Cy, who feels U. C.'-- Union Carbide --'knows the score -- thinks some reference should be made to Senate and House reports. I suggested deleting quote but making reference to reports. Cy concurs with this, 6/28,' is apparently that of Marion C. Mallory. The reference to Cy is to C. A. Daley and the reference to U.C. is to Union Carbide."

Finally, Exhibit 130, your Honor, is the final letter sent by Mrs. Mallory to Union Carbide.

MR. STRUVE: We don't object to the receipt of Exhibits 128, 129 and 130 as to New York Telephone. There is no evidence that any of these documents was transmitted at or about the time to AT&T, and what the documents show is that after receiving AT&T's advice New York Telephone made their own decision as to the letter they would send to Union Carbide.

THE COURT: It will be received without

reservation as to New York Telephone Company and AT&T, subject to connection as far as the other defendants are concerned.

128, 129 and 130 may be admitted.

(Plaintiffs' Exhibits 128, 129 and 130 were received in evidence)

MR. NICKERSON: Now, your Honor, I am moving to another customer, namely, Mobil Oil Corporation, and I offer Exhibits 144 and 146. If I might read from the stipulation of documents as to Exhibit 144, it reads as follows:

"The letter dated August 22, 1968, and marked Exhibit 144, was received by J. Curren, account manager Mobil Oil of New York Telephone, from A. T. Wacker, Manager,Communications,Mobil Oil Corporation. The handwriting which apparently reads 'Talked to Mr. Charvat (AT&T) as to position of Bell System - any chance of tariff change so that more advantageous tax treatment can apply - Mr. C. says no -- tariff people aren't about to change - accounting advised MCM 10/3/68.'"

THE COURT: What word did you use before "people aren't about to change"?

MR. NICKERSON: Tariff people.

THE COURT: Which people?

MR. NICKERSON: Tariff.

THE COURT: Oh, tariff people.

MR. NICKERSON: "Tariff people aren't about to change. Accounting advised. MCM 10/3/68" is apparently that of Marion C. Mallory, attorney legal department of New York Tel.

146, your Honor, is the letter that was sent by Mr. Curren of New York Telephone Company to Mr. Wacker.

MR. STRUVE: Excuse me, Mr. Nickerson. Before you leave Exhibit 144, I should state that we don't object to the receipt of the letter as to New York Telephone, but we do object on the grounds of lack of identification and hearsay as to the handwritten note. We were not able definitively to identify who wrote it.

Quite apart from that, it doesn't purport to quote verbatim anything that Mr. Charvat may have said, and there is no indication that the quote represents what any AT&T person in the rate and tariff group actually said.

Mr. Charvat was asked about this note in his deposition, and he was unable to recall any statement of this tenor to anyone.

THE COURT: Have you established that Miss

Mallory wrote this?

MR. NICKERSON: Obviously from the description, your Honor. She is retired and down in Florida, and it says it is apparently her handwriting, and it is her initials and she was the person involved in these matters, as we have seen in the Union Carbide case.

THE COURT: I want to make sure I understand Mr. Struve's position. Why did you stipulate to that effect?

MR. STRUVE: We stipulated that it was apparently her handwriting simply because --

THE COURT: I will take it, then, on the basis of "apparently" and evaluate it accordingly.

MR. STRUVE: Regardless of whether it was her handwriting or not, our hearsay objection would still be pressed, your Honor.

THE COURT: No. It may be received in its entirety, without reservation as to New York Telephone Company and the defendant AT&T, and subject to connection as far as the other defendants are concerned.

(Plaintiffs' Exhibits 144 and 146 were received in evidence)

THE COURT: Suppose we take our mid-morning recess now, unless you have something immediately.

MR. NICKERSON: I have almost finished this subject. I have about four or five Owens Corning.

THE COURT: Let's take our mid-morning recess.

(Recess)

THE COURT: Proceed, please.

MR. NICKERSON: Your Honor [illegible] was about now to move to Owens-Corning Fiberglass Corporation asking for separation of the rates, and I would like to offer as a group Exhibits 147, 149, 151 and 152.

147 is the request by Owens-Corning Fiberglass Corp. that they be split.

149 is a follow-up of that, and you will see in 151 that a copy of Mrs. Mallory's letter to Union Carbide was sent out to Ohio Bell.

This was Ohio Bell that we are now concerned with, your Honor.

Exhibit 147 was received by Robert M. Fehlen, Communications Consultant of Ohio Bell, from Bruce C. Williams, Office Manager of Owens-Corning Fiberglass Corp.

THE COURT: Exhibit 149 refers to Mr. Lynd's letter of May 27th. Where is that?

MR. NICKERSON: Perhaps I ought to give that to you also, your Honor.

THE COURT: Yes.

MR. NICKERSON: I will give that to you.

MR. ATRUVE: I suggest that 148 should be in the record.

MR. NICKERSON: Yes; it should, and I will offer that, too. I omitted, your Honor --

THE COURT: What is the letter of Bruce C. Williams that is referred to -- Oh, I see.

MR. NICKERSON: That is the first one, your Honor.

THE COURT: That is the letter of April 8, 1968.

MR. NICKERSON: Your Honor, inadvertently I omitted to offer 152, which is part of the batch, and 150 as well.

THE COURT: As I understand it, Exhibit 150 is signed by John T. Alter, sales manager, to E. D. Clouse. Of whom was Mr. Alter sales manager?

MR. NICKERSON: Of Ohio Bell.

These are all in the stipulation of documents, your Honor.

THE COURT: All right.

MR. NICKERSON: Exhibit 147 was received by Mr. Fehlen, who was communications consultant of Ohio Bell, from Bruce L. Williams, who was office manager of Owens-Corning Fiberglass Corporation.

Exhibit 148, the memorandum dated May 27, 1968, was sent by R. F. Lynd, a marketing supervisor of Ohio Bell, to E. D. Clouse, a division sales manager of Ohio Bell.

Exhibit 149, the letter of June 26, 1968, was received by E. D. Clouse from Bruce L. Williams.

MP

Exhibit 150 is a memorandum dated August 12, 1968, was sent by John T. Alter, a sales manager of Ohio Bell, to E. D. Clouse, with copies as indicated, and that reports on Ohio Bell's meeting with Owens-Corning, and it states why Owens-Corning feels the responsibility of making the separation should fall on the telephone company.

That is an important paragraph, your Honor.

THE COURT: Let me read the letter, won't you?

MR. NICKERSON: Certainly, your Honor.

(Pause.)

THE COURT: All right.

MR. NICKERSON: Your Honor, if you have reached 151, may I read the stipulation of documents?

"The copy of the document marked Exhibit 151 was sent by C. F. Hurd, Supervising Accountant, Taxes of Ohio Bell, to H. C. Luppens, Assistant Commercial Supervisor, Rates, of Ohio Bell, on or about November 14, 1968."

Your Honor will recognize that as a copy of the letter Mrs. Mallory sent to Union Carbide.

THE COURT: All right.

MR. NICKERSON: Finally, Exhibit 152, your Honor, a memorandum dated May 14, 1969, was sent by E. D. Clouse to W. E. Mirre, a division sales manager of Ohio Bell.

(Pause.)

THE COURT: Before we go further -- unless you want to say something now with respect to these exhibits, Mr. Struve.

MR. STRUVE: Simply that we don't object to their receipt as to Ohio Bell and AT&T.

THE COURT: They are received without reservation as to Ohio Bell and AT&T but taken subject to connection with respect to any other of the defendants.

One of the letters by a customer referred to the payment of increased taxes. Maybe you can enlighten me. The act of 1965 with respect to Centrex did not result in increasing taxes, but there is a reference to increasing taxes. Can you explain that?

MR. NICKERSON: I think that refers to increased taxes in connection with PBX. I will get the document.

THE COURT: The point was that they didn't get the exemption they thought they would. Here it is: Exhibit 144 from Mobil Oil Corporation.

> "We were amazed to find that the taxes on our main billing increased approximately $2,500 per month, of which about $1,900 represents an increase in the federal excise tax.
>
> "The explanation given to us by the Business Office is that all Centrex lines are subject to federal

tax because they are considered trunk lines.

"We request the Telephone Company to investigate this item".

I don't understand the increase in the tax.

MR. NICKERSON: I think it is explained if you look at the paragraph at the bottom of the page, your Honor. What he is saying is that heretofore they did not have Centrex service. They had PBX.

THE COURT: Then they were separated.

MR. NICKERSON: They were separated; right.

THE COURT: Is that your understanding of it, too, Mr. Struve?

MR. STRUVE: It is.

THE COURT: I just did not understand how an increase in taxes came into play.

MR. NICKERSON: Let me see. I have one other document, your Honor, which I offer. It is from American Oil Company, and you will notice the date on this one. It is dated August 16, 1965, so that it precedes the October 1965 conferences.

THE COURT: Well, actually this letter has the explanation, the answer to the question I have just put, in one of the paragraphs.

"As we see it, a non-Centrex location would pay three per cent in 1966, two per cent in 1967 and one per cent in 1968." and so forth.

A Centrex location, however, where tariffs combine local service with those PBX lines would pay the taxes for three years on the additional amount. This would make a considerable difference in cost.

MR. STRUVE: No objection as to Illinois Bell.

THE COURT: It will be received without reservation with respect to Illinois Bell and AT&T and subject to connection with respect to the other defendants.

Was there ever an answer to this letter?

MR. NICKERSON: No. They produced nothing for us, your Honor.

THE COURT: In this letter they say, "We ask that you separate our charges for Centrex in 1965."

MR. NICKERSON: Now, your Honor, I am passing to another subject, and it is that certain of the companies did not file Centrex rates, or tariffs, rather, until after the effective date of the act.

THE COURT: Well, there were four companies.

MR. NICKERSON: Yes. Actually, there were five, your Honor.

THE COURT: All right. I thought the stipulation said four.

MP

All right. Go ahead.

MR. NICKERSON: If you will turn to Attachment B, you will see the very first one -- Attachment B, that is -- of the stipulation of the facts.

THE COURT: That would be Bell of Pennsylvania.

MR. NICKERSON: Bell of Pennsylvania. It was filed, first became effective on August 14, 1967.

THE COURT: Is Diamond State next?

MR. NICKERSON: Diamond State. your Honor, you will see, was 10/24/68. In a moment I am going to put in exhibits, your Honor, preliminary to these filings. The Diamond State tariff work was done by the Bell of Pennsylvania people.

Then, if you notice Northwestern Bell, your Honor, in Minnesota, they did not file until 3/10/66, and it became effective 4/1/66.

I should have taken Illinois Bell and Indiana Bell next.

Illinois Bell and Indiana Bell didn't file until 1967

Northwestern did not file until March of 1966, in Minnesota.

In New York.

THE COURT: Just a moment. Where is Minnesota?

MR. NICKERSON: Under Northwestern Bell, your

Honor, and New York has a part of Connecticut within its service area, and it didn't have an effective tariff until 1970.

THE COURT: There is no indication of when that was filed?

MR. NICKERSON: No. I will have to find that for you, your Honor. It was in or around that time, but I will check that before the next session.

THE COURT: All right.

MR. NICKERSON: Now, your Honor, I would like to offer -- Mr. Heller reminds me, too, that the Pennsylvania tariff is already in evidence as Exhibit 41-B.

Now, your Honor, I would like to offer Exhibits 154 and 153. 154 is a memorandum sent by W. Wohlhagen, who is the General Rats Supervisor-Administration of Pennsylvania Bell, to G. H. Ruschhaupt, an Assistant Vice President of Pennsylvania Bill, in July 1967, and 153 is a memorandum -- I guess that should have come first -- dated March 7, 1967, sent to J. F. Hulihan, General Marketing Manager, Central Area of Pennsylvania Bell by G. H. Ruschhaupt, an assistant vice president of Pennsylvania Bell.

THE COURT: Is the letter available, that is, the letter dated February 7, 1967, referred to in Plaintiff's Exhibit 153?

MR. NICKERSON: I don't have it, your Honor. I don't think it was produced.

THE COURT: Is 154 the attachment that is referred to in 1953?

MR. NICKERSON: No, your Honor. They are two different states.

THE COURT: Where is the AT&T letter referred to in the last paragraph of 153?

MR. NICKERSON: It wasn't attached to this copy, but I think from the context, your Honor, what that refers to is the April -- I may be wrong on this -- the April 1961 letter of AT&T.

MR. STRUVE: I don't know what letter is referred to, but we can be quite sure it was not the April 1961 letter, because that letter made no reference to the excise tax.

MR. NICKERSON: I think Mr. Struve is right.

MR. STRUVE: Mr. Nickerson is correct in saying that as found in Pennsylvania Bell's files, this letter did not have any attachment to it.

MR. NICKERSON: I offer those, your Honor.

MR. STRUVE: No objection as to Pennsylvania Bell, Your Honor. I would observe that there is a statement made there about AT&T, and that is, of course, hearsay.

THE COURT: It will be received without reservation as to Pennsylvania Bell and AT&T and subject to connection as far as the others are concerned.

MR. NICKERSON: Now, your Honor, I offer Exhibit 143, which is a memorandum dated June 12, 1968, sent by G. J. Hartman, Rate Supervisor-Tariff Administration of Pennsylvania Bell, to B. L. Agnew, General marketing Supervisor, Eastern Area of Pennsylvania Bell.

Your Honor will recall, we heard reference to Mr. Hartmen today.

MR. STRUVE: Your Honor, we have no objection to Exhibit 143 as to Pennsylvania Bell. It is hearsay as to the other defendants.

THE COURT: It will be received as to Pennsylvania Bell and AT&T without reservation and subject to connection as far as the other defendants are concerned.

MR. NICKERSON: Now, your Honor, I am moving to another subject and to documents in 1968 and 1969, which show that AT&T conducted a review of Centrex service with the associated company rate people, and I will offer together Exhibits 121 and 122.

Exhibit 121 is a document that was prepared by William H. Doughty of the Switching Systems Rate Plans Group of AT&T, and the document is dated September 1968.

Exhibit 122 is a letter dated February 3, 1969, sent by R. T. Dugan, as he pronounces it, Assistant Vice President of AT&T -- Marketing and Rate Plans -- Exchange Services to the Rate and Marketing heads of all of the defendant operating companies.

I would like to draw your attention, when you have looked at it, your Honor, to certain items in Exhibit 121.

(Pause.)

THE COURT: All right, Mr. Nickerson.

MR. NICKERSON: Your Honor, may I draw our attention to one or two matters in Exhibit 121?

THE COURT: Yes.

MR. NICKERSON: On page 39377, the paragraph just above the middle of the page, which starts with the sentence, "Centrex is almost universally regarded as a better earning service than its chief competitor, basic PBX service."

You will recall that one of the things in the 1961 April instructional material was that there should be an attempt to better the earnings on old PBX equipment.

On page 39378, the first two paragraphs there, your Honor, refers to the general rise in labor and material prices having pushed Centrex return downward, and, secondly, implementation of automatic identified outward dialing (AIOD) operation "has been slow due to a desire to maintain earnings in the face of substantial cost increases for that portion of Centrex CU service. Only one company (Pacific) has been installing AIOD with every new Centrex CU."

You will recall, your Honor, that Centrex CU did not have the capability of automatic identification. They said it would be a few years before they did, and this is seven years later, and even at that date only one company is installing it with every new Centrex CU.

Mr. Heller reminds me to say even though the cost was included in the tariffs all those years.

Now, your Honor, you remember you asked me a question -- I think it was the first day -- about the fact that in Attachment C, the last column thereof, certain of the companies under the heading "Companies Determine CO or CU," Attachment C to the stipulation of facts, "As to certain of the companies the entry is "No" and as to others the entry is "Yes".

As to those companies, your Honor, that have a "No" and alongside that the notation "Note 10", that note reads, Tariff does not provide that Telephone Company determines whether to offer Centrex CO or Centrex CU but provides that offering of Centrex service is subject to availability of facilities, and, your Honor, you will see in Exhibit 121 the various companies that report here. Those ones which do not have in the tariffs that they determine the choice of Centrex CU or CO as a practical matter do that by use of a provision that provides that it is subject to availability of facilities, and I won't read each of the companies. I just want to draw your attention to the fact that that is in the specific reports from the companies referred to in Exhibit 121, and there will be further testimony on that.

But I will bring that all together for you later, your Honor.

MR. STRUVE: Your Honor, before we leave Exhibit 121, in view of the emphasis that has been placed by plaintiffs upon the alleged excessiveness of the Centrex rates, I would like to read a few more sentences on page 39377.

> "Earnings objectives for Centrex are apparently being met in 10 Companies serving 30% of the Centrex station. In the Companies with the remaining 70% of Centrex development earnings appear to fall short of objectives.
>
> "Any generalized reputation Centrex may have gained as a 'loser' would seem to have arisen from knowledge of specific adverse situations and unusual cases rather from a general view of the overall service in any Company."

MR. NICKERSON: I don't want to extend it longer, your Honor, but I think that points up the exact thing that I was arguing, and that is, we are not here in a rate case, as to whether they were excessive or not. The point is the relationship of Centrex rates with PBX rates, and what is shown here is that Centrex was regarded almost universally as a better earner than PBX.

True, costs went up, so that PBX and Centrex may not have earned their original projections, but the point that we make is the relationship between PBX and Centrex, and we are not trying a rate case.

THE COURT: Well, you almost track precisely the language that is contained on that very page under the heading "Factors that tend to improve earnings"

> "Centrex is almost universally regarded as a better earner than its chief competitor, basic PBX service.

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MR. NICKERSON: Now, your Honor, I am moving on to another subject. First I would like to hand up to you -- you cited it in one of your opinions -- the Revenue ruling 69-152. You will recall this was the ruling, your Honor, which said that the separate charge did not have to be on the bill, and the holding in the ruling is that the billing procedure followed by the telephone company meets the requirement of a separate charge for private communication service. Up further it said the telephone company retains records itemizing in precise detail the monthly rates and charges for the specific items of equipment and service furnished.

There is no reference, your Honor, in here to the tariff in the ruling, though as you will see in certain of the -- I have forgotten now what it is called -- technical advice they do use the word "tariff." I would like now to offer Exhibit 160, which is a letter from Mr. Charvat to a Mr. Barrett, who is an attorney with New Jersey Bell, and to it he attaches a letter from Mr. Ferrall to the District Director of the Internal Revenue Service in Newark, and attached to that is a memorandum prepared by AT&T.

The thing which I would like to draw your attention to, your Honor, relates to the question we have discussed from the opening day, and that is whether the separate charge in the statute has to be one in the tariff. If you will look at page -- perhaps I should wait until your Honor --

THE COURT: Go ahead.

MR. NICKERSON: If you will look at the pages stamped 11213 and 11214, you will see that AT&T argues to the Internal Revenue Service that the separate charge there is a separate charge in a tariff. And they refer to Draft A, and they say that the proposed definition of the term "local telephone service" refers to a charge provided in a local exchange tariff. Then they say, on page 11215, "Although the amendment" in the eventual Act "did differ in some small degree from the amendment proposed in Draft A, the concept did not change." And they do not inform the Internal Revenue Service that Congress took out the tariff language.

THE COURT: Isn't it fair to assume that the Internal Revenue Service was aware of the process of bill drafting and what was going on? I would think so.

MR. NICKERSON: I don't know whether that is fair to assume or not.

At any rate, that was the argument that they used, and they used Draft A, and they told them that one

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reason it should be a tariff charge is because we have the tariff language in this draft. And then they say it differed in some small degree, but they did not say it was taken out of the Act.

THE COURT: That is a consistent position they have taken, though, isn't it?

MR. NICKERSON: I think not, your Honor. I think it only would have been fair to have said to them, "What's more, the tariff language was taken out of Draft A, and when the Act was finally passed, it didn't contain the tariff language." That is what I think would have been a fair and forthright way of saying it, instead of saying it differed in some small degree but the concept was the same.

At any rate, it speaks for itself, your Honor.

MR. STRUVE: Your Honor, with respect to Exhibit 160, on the second page, page 11208, reference is made to a letter dated December 12, 1967 --

THE COURT: Yes.

MR. STRUVE: -- to New Jersey Bell Telephone Company, enclosing a copy of the request for technical advice made by the District Director of the IRS for Newark, New Jersey, to the national office. It was with respect to that request for technical advice that this letter and

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memorandum were submitted.

We would suggest that for the sake of completeness the request for technical advice, which is Exhibit 159, and the technical advice rendered by the IRS national office, which is Exhibit 161, should also be received.

MR. NICKERSON: You will receive them eventually, your Honor. I have no objection.

THE COURT: We may as well take them now.

MR. NICKERSON: Yes. Let us put them in now, your Honor.

THE COURT: Offer them now.

MR. NICKERSON: What are the exhibit numbers?

THE COURT: 159 and 161, I believe Mr. Struve says.

(Plaintiffs' Exhibits 159, 160, and 161 received in evidence.)

x

MR. STRUVE: Your Honor, for the record, may I note that with respect to Exhibit 161, which is the national office's technical advice, that on the last page, page 11221, the IRS held that the term "separate charge" means separate tariff charge.

THE COURT: I read that.

MR. STRUVE: And on the transmittal letter it

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is made apparent that the District Director in Newark sent that to New Jersey Bell Telephone Company so that it could be guided thereby.

MR. NICKERSON: Your Honor will see that Mr. Ferrall made the same argument, referring to the language in Draft A prior to this technical advice as is in Exhibit 160, and it is clear that they did not include the tariff language in the Rev. ruling 69-152. They simply said it had to be on the books.

I think I have made my point, your Honor, or at least tried to explain my point.

THE COURT: Apparently the IRS had two positions here. In one instance they said the separation could be made on the books, and in the other instance they referred to it as a separation only if it is a tariff charge. That is the last exhibit that came into evidence. The last statement here in Exhibit 161 reads: "Accordingly, it is held that so long as telephone companies maintain in their records, in accordance with their tariff documents, a separation of charges for taxable local telephone service and nontaxable private communication service, the need to show such separation on billings to subscribers is unnecessary."

Then in the document that you referred to as to the Revenue ruling it was held: "The billing procedure followed by the telephone company meets the requirement of a separate charge for private communication service. Accordingly, amounts paid for such service are not subject to the tax on local telephone service imposed by Section 4251 of the Code."

MR. NICKERSON: I think if you look at the sentence just above what you read, your Honor, on page 11221, of Exhibit 161, you will see that they say: "The term 'tariff' when used in connection with a public utility, such as a telephone company, pertains to a schedule of charges."

There was no reference to a tariff in the Act or in the Committee report. So what he is simply referring to there is Mr. Ferrall's letter in the paragraph at the top of the page in which he is saying that the definition of local telephone service refers to a charge provided in a local exchange tariff. And that is the very language that was taken out of the Act.

THE COURT: I understand that. We are getting into a semantic discussion about this now.

MR. NICKERSON: I think I have labored it.

THE COURT: The defendants' position is perfectly clear and your position is equally clear.

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MR. NICKERSON: All right. Now I am moving on, your Honor, to another subject, and that is I am now getting into the decision to separate the rates.

First I would like to hand up to your Honor the Federal Communications Commission decision in the Carterfone case. You will recall that was the case, your Honor, that struck down the tariffs of the telephone company --

THE COURT: Which prohibited the connection of outside private communication systems to telephone company equipment.

MR. NICKERSON: Correct, your Honor.

THE COURT: That is a pretty long opinion.

MR. NICKERSON: Yes.

THE COURT: I think you had better tell me what parts you want me to look at.

MR. NICKERSON: Yes, I don't think you need read it, at least in detail, other than to know that they were stricken down, and the tariffs, your Honor, that were stricken down are on page 427, and they say that no equipment, apparatus" -- etc. -- "not furnished by the telephone company shall be attached to or connected with facilities furnished by the telephone company." That is the only point I wanted to make with it.

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Now I am going to move in --

THE COURT: And you suggest that in part that triggered the separation by the defendants.

MR. NICKERSON: Yes. And that is what I am about to show you, your Honor. Because what happened then was that it brought on competition, head-to-head competition with Centrex service.

THE COURT: When is the date of this decision?

MR. NICKERSON: June 26, 1968. But it took some time, as you will hear from the testimony, your Honor, for the competition to develop.

THE COURT: Competition to develop?

MR. NICKERSON: Yes. Because they had to gear up their equipment and so forth. I don't think there is much dispute that this was one of the reasons that they separated.

First, your Honor, I would like to offer Exhibit 169. This is the first one that was produced to us in which that factor of competition was mentioned. It is a letter dated January 7, 1971, from a Mr. C. R. Mott, Jr., the General Marketing Manager for the Tennessee area of South Central Bell, and the letter goes to Mr. Bates, who is Assistant Vice President, Commercial and Marketing of South Central Bell.

THE COURT: Proceed.

MR. NICKERSON: Is that received, your Honor?

THE COURT: Yes.

(Plaintiffs' Exhibit 169 received in evidence.)

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MR. NICKERSON: Now I offer Exhibit 173. 173 is a letter dated March 5, 1971, sent by W. O. McCoy, who was the General Commercial Manager of South Central Bell in the Tennessee area, to C. R. Mott.

MR. STRUVE: Your Honor, no objection as to South Central Bell. I should note that what Exhibit 173 consists of is the General Commercial Manager in Nashville passing on what he has received from South Central Bell headquarters in Birmingham, which in turn may contain something which they learned from AT&T.

THE COURT: It will be received without reservation, as to these last two proffered exhibits, as to South Central Bell and AT&T, and subject to connection as far as the other defendants are concerned.

(Plaintiffs' Exhibit 173 received in evidence.)

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MR. NICKERSON: Now I offer Exhibit 178, your Honor, which is a memorandum dated May 4, 1971, and sent by W. P. Campbell, a General Rate Supervisor of Illinois

Bell, to G. W. Trout, Assistant Vice President of Illinois Bell. It is stipulated that the handwriting on the memorandum quote reading 'Mr. Norlander - no relief here. T.' is that of G. W. Trout. The reference to Mr. Norlander is to E. C. Norlander, General Marketing Manager of Illinois Bell.

That is in paragraph 178 of the stipulation as to documents.

MR. STRUVE: Your Honor, no objection as to Illinois Bell. I should note that the memorandum was not prepared by Mr. Campbell, and we are not sure who it was prepared by. The statement attributed to Mr. Kemp of AT&T is hearsay, and I should note for the record that Mr. Kemp testified in his deposition that it was not --

THE COURT: I assume on a given point I will have all the testimony on the subject. I cannot accept your statement. Either Mr. Kemp will testify or his deposition will be read.

It will be received at this time without reservation as to Illinois Bell and AT&T, and subject to connection as far as the other defendants are concerned.

(Plaintiffs' Exhibit 178 received in evidence.)

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MR. NICKERSON: Now, your Honor, I offer Exhibit 189.

Exhibit 189, it is stipulated in the corresponding paragraph in the stipulation as to documents, was sent by W. H. Bowen, Vice President-Staff, of Southwest Bell, to R. T. Dugan, who is Assistant Vice President of AT&T. What this relates to, your Honor, is of some importance here. You will see that attached as a part of Exhibit 189 is a ruling by the Internal Revenue Service as to the application of federal excise tax to so-called peripheral services, wink-hold lights, etc., the charges for which the Bell Companies had not collected taxes. And you will see later that this plays a major part in why they decide to separate it, because if the Internal Revenue Service is going to tax those peripheral services as well, if there is no separate charge, it makes the competition between Bell services and those that are going to come on as a result of the Carterfone decision even more acute, because the differential would be that much greater.

Again,I think there is not very much dispute about that.

MR. STRUVE: No objection as to AT&T and Southwestern Bell.

THE COURT: It will be received without reservation as to Southwestern Bell and AT&T; subject to connection as far as the other defendants are concerned.

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(Plaintiffs' Exhibit 189 received in evidence.)

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MR. NICKERSON: Now, your Honor, I offer Exhibit 181, which is in substance the same Internal Revenue Service ruling as is attached to 189, except it was made with respect to New York Telephone Company as opposed to Southwestern Bell Telephone Company.

MR. STRUVE: No objection.

(Plaintiffs' Exhibit 181 received in evidence.)

MR. NICKERSON: Your Honor, I now offer Exhibit 40. Exhibit 40, it is stipulated, is a memorandum dated June 7, 1971, and was prepared by A. X. Ichter, the Rate Supervisor-Switching Systems and Channels of Pennsylvania Bell and sent by him to J. B. Griffith, the General Accounting Supervisor-Taxes of Pennsylvania Bell.

Your Honor, you will see that this relates to the competitive aspects, and from the first paragraph you will see that direct inward dialing and automatic identification outward dialing are going to be features available to PBX system's subscribers and that they are going to require a major restructuring of the branch exchange service offerings.

What I would particularly like to draw your attention to, your Honor, is the material on page stamped

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17142, under the heading "Competitive Aspects."

THE COURT: All right.

MR. NICKERSON: Particularly, your Honor, the paragraph which reads:

"For example, one or the other of our current Centrex CO or CU offerings are vulnerable to regulatory criticism on the basis of being priced below the floor of costs (as the rates for both are based upon blended cost factors)"

And then on the following page I would draw your attention to just the first sentence, which reads:

"Under today's rate structure, Centrex Service is the top of the line and, as such, is priced at levels considerably higher than those for the established PBX offering, which is basically an interchangeable service. Even so, and despite an inherent tax advantage enjoyed by the current PBX offering (which is explained in detail in a subsequent section) Centrex, as the following figures attest, is far and away the faster growing revenue producer."

THE COURT: With respect to the paragraph on the previous page, where the writer states:

"For example, one or the other of our current

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Centrex CO or CU offerings are vulnerable to regulatory criticism on the basis of being priced below the floor of costs (as the rates for both are based upon blended cost factors)" -- what is your understanding of what he is referring to as to which one was priced below the floor? Would that be the CO?

MR. NICKERSON: He doesn't say, your Honor, but we have seen from earlier documents that CO would have been priced below its cost because it had a higher cost on the average than CU.

THE COURT: And I suppose you also rely upon that Denver case?

MR. NICKERSON: That didn't address itself directly to that issue, your Honor, to the difference in cost between CO and CU, but it did say that they were two different services. But I don't recall that the opinion addressed itself to the issue of cost.

THE COURT: Now I will hear your comment, Mr. Struve. What do you think he is referring to there?

MR. STRUVE: We don't have to guess, your Honor, because in his deposition Mr. Ichter said that this memorandum was a personal think piece which he wrote as he was getting into a new job.

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THE COURT: I recognize that, but what did he say he was referring to?

MR. STRUVE: He said with regard to this that he didn't know whether in fact Centrex CU or Centrex CO had higher costs, he was merely making the mathematical point that if one assumed that the cost differed and that the rate was based upon an average, then one would be higher.

THE COURT: And he wouldn't say which one he thought would be under the line in his testimony?

MR. STRUVE: That's right. Because he had not been in the Centrex job when the revenue requirements studies were done by Bell of Pennsylvania in 1966 and 1967.

In view of plaintiffs' argument that the defendants were concerned about some regulatory authority ordering that the two services be split, I think it should also be observed that the overall argument that Mr. Ichter was making in this memorandum was that Centrex CU and Centrex CO should be treated as two different services.

As you can see at the top of page 17142, he gave the name PBX-C to what was then Centrex CU. He gave the name PBX-D to what was then Centrex CO.

wcr4

And the remainder of his memorandum was a simplification of how the rates for PBX-C and PBX-D might be established on a separate basis, in which each would find their own cost level.

So that far from showing that any company was afraid of separating Centrex CO and Centrex CU, the memorandum shows that Mr. Ichter at least thought that it would be in the best interest of the company and its customers to do that under the new circumstances.

MR. NICKERSON: Precisely right, your Honor. I agree 100 per cent that he thought they ought to be different. And it is precisely the point that I am making.

THE COURT: While you are on that subject, Mr. Struve, in your statement of the defendants' factual contentions, under Appendix C, you list, as I recall it, four reasons why no recommendation for a separation of charges was made until 1971, and the last reason, which appears on page 12, is "There was concern that the filing of revised tariffs establishing separate Centrex station charges would contravene the original objective of simplicity and customer understanding of Centrex rates, and might lead to proceedings before state or local regulatory bodies."

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And then you continue: "For the reasons stated in paragraphs 21 and 22 above" -- and I think there you were referring to the Department of Defense filing and the other filings -- "the concern was not that any regulatory authority might hold that the Centrex rates of any defendant operating company were too high, but rather that the Centrex tariffs might be questioned in some other respect."

What are you referring to, that they might be questioned in some other respect? I understand your position saying you weren't concerned about rates there and a change of rates -- at least I think that is what it stands for. What are the other respects?

MR. STRUVE: Your Honor, we were referring first to Mr. Weber's testimony that he was concerned that some regulatory authority might hold that the rates should be raised.

THE COURT: Well, that contradicts the statement you have made there.

MR. STRUVE: No.

THE COURT: I would read it so. Correct me if I am wrong. Let me go back and read that to you. You say:

"For the reasons stated in paragraphs 21 and

22 above"—and 21 and 22, as I recall it, referred to the proceedings brought by the Department of Defense and the General Services Administration, which is set forth there -- and you continued: "...the concern was not that any regulatory authority might hold that the Centrex rates of any defendant operating company were too high."

MR. STRUVE: Mr. Weber testified that one of his concerns was a regulatory authority might hold that they were too low and might hold that they should be raised. It was AT&T's belief that the Centrex rate structure, which had been recommended to the operating companies, was in the best interest of not only Centrex customers but the public at large, and that raising the rates to bring them closer to individual business lines would be against the public interest as well as against the interest of Centrex customers.

You see, there is no concern --

THE COURT: Accepting your statement in explanation of that, I would like to know what you meant -- and as to the one who drafted this, I must assume he reflects the position of your clients -- "but rather that the Centrex tariffs might be questioned in some other respect"?

What do you mean by that? It is unclear.

MR. STRUVE: In the first instance we meant that some regulatory authority might say, not that the Centrex rates were too high, but that they were too low, that they should be raised to a level closer to individual business lines, which would disadvantage Centrex customers and make it more difficult --

THE COURT: That is the explanation you just gave with respect to Mr. Weber's position.

MR. STRUVE: And I wanted to say, that is the first --

THE COURT: That is the first part. I am asking as to the other respects.

MR. STRUVE: As to other respects, the testimony of both Mr. Weber and Mr. Kemp was that they didn't have other specific respects in mind. Their concern was that the whole area of Centrex, PBX, and how they relate to other business offerings such as individual business line, is so complex and is so much a matter of what are the existing tariff structures in any given jurisdiction, that they were concerned to some extent that some question that they did not presently ancitipate might come out at a hearing, which would cause a commission to question the existing rate structure.

THE COURT: I think at this point we will take our luncheon recess and resume at 1:30.

(Luncheon recess)

AFTERNOON SESSION

1:30 p.m.

THE COURT: Gentlemen, before you proceed, I have a question to ask you with respect to Exhibit 122, if you will both get that exhibit out.

On page 2 -- actually, the reference page is 39418 -- there is a statement:

"Many companies have by now filed rates for Centrex II, and some have filed rates for Centrex custom calling features."

What was Centrex II?

MR. NICKERSON: I should have put that in, your Honor, and I will offer it now.

I have two sets of documents. One is Exhibit 37-A and 37-B, and another is Exhibit 39.

I would like to offer these. It was referred to later, and I should have put them in.

37-A and B is a memorandum -- I will read from the stipulation of documents.

Paragraph 37 of the stipulation of documents says, "The memorandum dated February 1, 1965, which, together with its 7 page attachment entitled 'Notes on Rate Principles and Illustrative Rate Treatment", is marked Exhibit 37A, was sent by F. C. Smith to the General Commercial Managers, General Traffic Managers, Chief Engineers and Public Relations Vice Presidents of each of the defendant operating companies. A further attachment entitled 'Addendum to Notes Accompanying Letter Dated February 1, 1965' and marked Exhibit 37B was distributed with Exhibit 37A to Rate Representatives of each of the defendant operating companies."

Now, what this basically does was to summarize the basic rate principles which they say the companies may wish to follow to render Centrex service lower than the 300 station range.

You will recall, your Honor -- the second sentence on the first page recites:

> "At the time of Mr. Kertz's letter in April of 1961, analysis of the costs of facilities indicated that in most situations -- not all but most systems with fewer than 300 stations would raise rate levels too high to be attractive to customers. Accordingly, most companies established minimum stations requirements at about that level.

Now, what they are saying is that subsequent developments in system design suggest that it is feasible to offer Centrex 1 -- which was what was contained in Mr. Kertz's letter -- to customers whose station requirements fall within the 100 to 300 station range.

Now, that is 37A and B.

THE COURT: That refers to Centrex I service?

MR. NICKERSON: Centrex I; right.

THE COURT: My question was, what is Centrex II?

MR. NICKERSON: I have to complete the picture, your Honor. I wanted to have both of them.

Centrex II is referred to in Exhibit 39, which I offer, and it is the de luxe version of Centrex, and it includes additional capabilities, which, as you will see in the second paragraph on the first page of Exhibit 39, includes dial transfer, consultation hold, add-on conference and trunk answer any station in addition to the basic features provided in Centrex I.

So it was the de luxe version of Centrex I.

THE COURT: Now, was any tariff filed for Centrex II?

MR. NICKERSON: Indeed, your Honor.

THE COURT: When? Or do you want to come to that in due course?

MR. NICKERSON: It is already in the stipulation. I am not sure we distinguished between Centrex I and Centrex II. I will have to check it. But I am pretty sure it is in the four tariffs that we submitted to your Honor.

THE COURT: Do you want to offer Exhibit 39?

MR. NICKERSON: 37A and B and 39.

MR. STRUVE: Your Honor, as in the 1961 letter, Exhibit 8A,8B,8C, we are not in a position to vouch for the fact that the figures assumed in 37A and B and 39 correspond to the actual figures in any defendant operating company. I should also note that Attachment F indicates graphically what the minimum number of unrestricted Centrex stations provided in the tariffs on the various operating companies in fact were from 1961 to 1972, and as your Honor will see from studying that Attachment B, a number of companies had minimum numbers of stations substantially below the 300 stations well before AT&T recommended that, while on the other hand a number of companies did not go under 100 stations until well after AT&T recommended it, and even today there are companies that have minimums higher than 100 stations.

MR. NICKERSON: I should have added, your Honor, that Paragraph 39 of the stipulation of documents recites that Exhibit 39 was sent to the General Commercial Managers of all the defendant operating companies.

THE COURT: Now, returning to Attachment F, to which Mr. Struve referred, as I look at the footnote I see next to Centrex II there is a Centrex III. What is Centrex III? That is on Attachment F.

MR. NICKERSON: Yes, and I do not have that Centrex

MP

III here with me, your Honor, but I will have it by tomorrow.

The point is that all of these were package rates and were subject to the tax.

Now, your Honor, we are back in 1971, June of 1971. I was getting into the subject of AT&T now considering the separation of the rates, and the next exhibit I have on that subject is Exhibit 183, which I offer.

Exhibit 183, your Honor, is a memorandum dated June 17, 1971, with attachment, which was received by R. M. Kemp in the Rate Organization of AT&T, and it attaches a letter from the Long Lines Department of AT&T. It is from one office of the Long Lines Department to another, and basically what it recites is that the Bell Systrem Centrex service is at a decided competitive disadvantage to privately owned systems and that United Airlines has expressed concern about that.

THE COURT: All right.

MR. NICKERSON: Is that received, your Honor?

MR. STRUVE: No objection to receiving Exhibit 183 as to AT&T, your Honor.

THE COURT: All right.

MR. NICKERSON: Now I offer Exhibit 186, your Honor, which is a letter dated June 11, 1971, which was sent by Richard M. Smith, Assistant Vice President-Marketing of

Illinois Bell, to R. T. Dugan, Assistant Vice President of AT&T.

You will recall that Illinois Bell, according to a previous exhibit, had been asked to continue the billing of Centrex as they had in the past by Mr. Kemp, and now this is a letter in which they request that we press now to have this ten per cent tax equalized or removed because of head-on competition that they anticipate.

THE COURT: I take it that the FET refers to Federal Excise Tax in this letter; is that right?

MR. NICKERSON: Yes, your Honor.

MR. STRUVE: No objection as to AT&T and Illinois Bell, your Honor.

THE COURT: Received on the usual basis.

MR. NICKERSON: I will now offer, your Honor, Exhibit 187, which the stipulation as to documents recites is a memorandum dated June 10, 1971, signed by R. H. Kemp for J. B. O'Boyle and sent to R. T. Dugan. You are familiar with those names already.

The handwriting on the memorandum reads:

"Mr. Bonsack, We will have more on this soon. R.T.D. 6/11", that being the handwriting of R. T. Dugan. The handwriting on the memorandum reading "Mr. Dugan, Thanks - S.E.B. 6/15" is that of Samuel Bonsack, Vice President of

AT&T.

THE COURT: All right.

MR. NICKERSON: May I draw your attention, your Honor, or perhaps explain the third paragraph, which has reference to the IRS audit of FET collection. That is a reference to the peripheral equipment that you already have in evidence with respect to the IRS.

Now, your Honor --

THE COURT: Mr. Struve wants to say something.

MR. NICKERSON: I am sorry.

MR. STRUVE: No objection as to AT&T, your Honor.

THE COURT: It will be received on the usual basis.

MR. NICKERSON: Now, your Honor, I offer Exhibit 119. Exhibit 119 is an issue of "Tax Talk", about which you have heard already. This one is dated June 14, 1971, and it was prepared by the General Tax Section of the Comptroller's Department of AT&T and sent to various persons in each of the defendant operating companies.

I should say I am only referring to and only offering the part under the heading "Excise Taxes, Centrex Tariffs being examined."

MR. STRUVE: We object to this document as hearsay, your Honor. There is no indication of who wrote this or what information it was based upon.

Since it came from the Comptroller's Department of AT&T, it is quite clear that it was not written by a person dealing with rates and tariffs, and your Honor has before you more substantial, probative evidence of what was happening in 1971.

THE COURT: Of course, if there is more probative evidence the Court will consider it, but I don't understand your objection, anyway.

This was issued by the General Tax Section of the Comptroller's Department of American Telephone & Telegraph Company. Are you saying that one department doesn't know what the other department is doing and that you segregate these things department by department?

MR. STRUVE: I would think that the Rate Section would know better than the Tax Section of the Comptroller's Department.

THE COURT: All right. I will take it.

MR. NICKERSON: I will offer Exhibit 190, your Honor, a memorandum dated June 15, 1971, with attachment, sent by W. H. Bowen, Jr. to R. T. Dugan, Assistant Vice President of AT&T, with a copy to Victor E. Ferrall, with whom you are already familiar. The attachment is a copy of the letter which you have already seen, that came from Illinois Bell and is Exhibit 186.

THE COURT: All right.

Now, will you enlighten me with respect to the proffered Exhibit 190? What do the letters COAM stand for, in the first paragraph?

MR. NICKERSON: Yes, your Honor. What that refers to -- I will have to get help on this. I know what it means.

THE COURT: I am glad that there is at least one item that you are not familiar with in this very simple trial.

Do you mean that the Telephone Company lawyers are even stuck on that one?

MR. KATKIN: No, your Honor. That is an acronym for Customer Owned and Maintained. That is customer equipment maintained by outside --

THE COURT: Owned and maintained by the customer.

In any event, it is equipment furnished by somebody other than the Telephone Company.

MR. KATKIN: That is correct, your Honor.

THE COURT: It seemed for a second as if Mr. Struve himself was stumped by that question.

MR. KATKIN: Hopefully, your Honor, that is why I am here.

THE COURT: All right. Go ahead.

MR. NICKERSON: I offer that, your Honor.

THE COURT: As I read these various exhibits, what does come through here is that the Centrex service allegedly was disadvantaged by two separate items: one, that the PBX had been separated into component parts, and therefore there wasn't any tax on that part of it, and also by competitive offerings from outside, which, likewise, was not taxed.

MR. NICKERSON: The PBX competitive ones now would have the chance to compete directly with AT&T, which they didn't have before, because, pre-Carterphone --

THE COURT: That is what I am saying.

MR. NICKERSON: Yes, your Honor.

THE COURT: And then there is an outside, socalled independent competition, where they were supplying component parts, just as counsel for the AT&T referred to.

You seem puzzled by it. Give me the last exhibit. I think it is perfectly clear. If I am not expressing myself properly --

MR. NICKERSON: I think you are, your Honor.

THE COURT: You say the competitive situation is two-fold.

MR. NICKERSON: Yes. One, internal competition.

THE COURT: And then the outside competition.

MR. NICKERSON: Correct, your Honor.

THE COURT: That is all I am saying.

MR. NICKERSON: Correct, your Honor.

Has this one been received: 190?

THE COURT: I haven't read it yet.

MR. NICKERSON: I am sorry.

THE COURT: If I am not mistaken, I think the attachment to Exhibit 190 is in evidence already.

MR. NICKERSON: It is, your Honor. It is 186, and I simply wanted you to see that that was what was attached to 190.

THE COURT: It may be received.

MR. STRUVE: No objection as to AT&T.

MR. NICKERSON: Now, your Honor, I would like to offer as a group Exhibits 194, 196 and 198.

Exhibit 194 is a memorandum dated August 12, 1971, signed by Cyrus J. Halpern and sent to Victor E. Ferrall. Mr. Halpern is Assistant Comptroller of AT&T.

Exhibit 196 is a memorandum dated May 16th -- a mis-date -- written August 16, 1971 and sent on that date by A. X. Ichter, Rate Supervisor-Switching Systems and Channels of Pennsylvania Bell, to W. J. Wohlhagen, General Rate Supervisor-Administration of Pennsylvania Bell, and the memorandum describes an August 12th meeting.

Exhibit 198 is a memorandum dated September 15, 1971, written by Robert M. Kempt but signed by W.J. Rinkor of AT&T and sent to Richard Dugan.

What all this relates to, your Honor, is that Diamond State actually unbundled or was in the process of unbundling before the AT&T letter, which I am about to come to, was sent out to all the operating companies, and it shows that they got clearance for doing that from AT&T.

THE COURT: Do you like the word "unbundling" rather than "Separating the charge"?

MR. NICKERSON: I guess I used it because They used it in Exhibit 200. I don't like it any better, to answer your question.

THE COURT: You did mention Mr. Cyrus J. Halpern before, but just to --

MR. NICKERSON: He was Assistant Comptroller, your Honor.

THE COURT: Of what?

MR. NICKERSON: Of AT&T.

THE COURT: And the letter went to whom?

MR. NICKERSON: Mr. Ferrall, who is General Tax Attorney.

MR. STRUVE: Mr. Halpern was the Director of Taxes in the Comptroller's Department. He was not an Assistant Comptroller. He reported to an Assistant Comptroller.

THE COURT: Does it make any difference?

MR. STRUVE: Mr. Nickerson said it twice, and I would like the record to be correct.

MR. NICKERSON: I stand corrected. I think Mr. Struve is right.

THE COURT: Now, the DID referred to in Exhibit 196 is Direct Inward Dialing?

MR. NICKERSON: Correct, your Honor.

THE COURT: And the AIOD?

MR. NICKERSON: Automatic Identified Outward Dialing.

THE COURT: That is where the outward dialing is identified automatically, without the intervention of an operator.

MR. NICKERSON: That's correct, your Honor.

MR. STRUVE: No objection to 194 and 198 as to AT&T and no objection to 196 as to Bell of Pennsylvania.

THE COURT: I believe I read that one of these went to all operating companies. Am I mistaken about that?

MR. NICKERSON: You are, sir. None of them did.

THE COURT: It will be received without reservation as to AT&T.

MR. NICKERSON: And Pennsylvania Bell.

THE COURT: And Pennsylvania Bell. Also Diamond

State Telephone Company.

MR. NICKERSON: And Diamond State.

As I explained to your Honor, Bell of Pennsylvania handled the rate and tariff matter- for Diamond State.

Now, your Honor, you remember in Exhibit 196 Mr. Ichter said that Kemp will recommend basically the same sort of Centrex restructuring as Pennsylvania Bell had, and now I am offering Exhibit 200, which is a letter sent by R. T. Dugan to the Rate Heads and Marketing Heads of all the defendant operating companies, and it is dated September 27, 1971.

This basically is the document in which they set forth the information as to how to restructure, as they call it, the Centrex rates to achieve a more equitable application of Federal excise tax together with a recommended method of unbundling the Centrex rates.

THE COURT: Well, what this all adds up to is: it was a separation of the access component from the communication component, with the customer being billed the same amount.

MR. NICKERSON: Correct.

THE COURT: I think that may be oversimplifying it, but basically that is what the whole question was about.

Mr. Struve, I take it in large measure, this

Exhibit 200 sets forth the reasons why the separation had not been put into effect previously.

MR. STRUVE: That is correct, your Honor.

I believe it is worth nothing for the record that the plaintiffs in Paragraph 269-D of the stipulation as to documents agree that this document is based on first-hand knowledge.

THE COURT: I take it you have no objection to this going into evidence.

MR. STRUVE: I have none, your Honor.

THE COURT: All right. It may be received.

MR. NICKERSON: We will have further evidence on that issue, as you know, your Honor, as to the reasons, and further documents.

THE COURT: I was simply referring to what the defendants' position was, and I am aware of the fact that neither one of you accepts the position of the other.

MR. NICKERSON: I now offer Exhibit 203, which is a memorandum dated January 6, 1972, which was sent by Mr. Victor E. Ferrall to Mr. R. T. Dugan. Mr. Ferrall is the General Tax Attorney, and Mr. Dugan is Assistant Vice President.

Your Honor will see that this is dated some months after Exhibit 200, the letter with respect to separation, and what I offer it for is to show that the proposed restructuring of Centrex rates had not been discussed with the Internal Revenue Service.

THE COURT: This letter of January 6, 1972, on the second page, refers to a reply to Mr. Woodworth dated December 17, 1964. I take it that is already in evidence.

MR. NICKERSON: It is.

THE COURT: That is the one wher he undertook to answer three specific questions.

MR. NICKERSON; Yes. Correct.

THE COURT: What exhibit is that?

MR. NICKERSON: Let me check is.

It is Exhibit 76, your Honor.

Is Exhibit 203 received?

THE COURT: Yes.

(Pause.)

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MR. NICKERSON: I now offer Exhibit 201, your Honor. This is a memorandum dated January 19, 1972, with an attachment, and was sent by P. D. Loser, assistant vice president of AT&T, to the General Commercial Manager of all the defendant operating companies. And, as you see at the head of it, it recommends procedures for implementing the restructured Centrex tariffs.

All I would draw your attention to at this time is the material on page 17576, relating to customer negotiations, particularly the material near the bottom of the page which sets forth the points to be included in a suggested response to customers.

MR. STRUVE: Your Honor, I should state for the record that this document also was stipulated in paragraph 269D of the document stipulation to be based upon information supplied by persons with first-hand knowledge. We have no objection to the receipt of Exhibit 201, but I should point out that the descriptions of the necessary changes in operating companies' service order and billing procedures upon the restructuring of the Centrex station charges is illustrative only, because service order and billing procedures differ substantially from operating company to operating company.

x (Plaintiffs' Exhibit 201 received in evidence.)

MR. NICKERSON: Now, your Honor, I offer Exhibit 206. This is a memorandum dated January 18, 1972, and was prepared and circulated within the rate planning division of C&P of Maryland. I would like to draw your attention just to two points on it. You will note the date is January of 1972 and that there is a reference to at least two other companies having already restructured, namely, Pennsylvania and Illinois. Then it says:

"Customers such as Weirton Steel, who operate in two jurisdictions, quickly question why is there a difference in taxable base. As more companies file, our position will become untenable."

And then skipping down a few lines, I would like to draw your attention to the language which recites that:

"The filing is completely uncontroversial - Centrex customers get a tax break - no revenue effect."

MR. STRUVE: No objection as to C&P of Maryland.

I should state that the remarks read by Mr. Nickerson reflect the individual speculation of the employee who wrote it.

MR. NICKERSON: Is that received, your

Honor.

THE COURT: Yes.

(Plaintiffs' Exhibit 206 was received in evidence)

MR. NICKERSON: I now offer Exhibit 207, which is a memorandum from another company, this one C&P, which was sent to B. R. Jacobs, the assistant vice president-revenue requirements-rate planner.

The only point I offer it for is the paragraph which commences: "As recommended by '195,' it would be prudent to implement this completely uncontroversial change independent of any other matters requiring commission action, and at the earliest opportunity."

MR. STRUVE: No objection as to C&P. In view of the repeated emphasis which Mr. Nickerson has put upon the words "completely uncontroversial change," I believe it should be noted for the record it has been stipulated and it will be submitted in an exhibit to your Honor that the Colorado Public Utilities Commission refused to permit the restructuring to become effective as to Centrex CO.

THE COURT: Is that the case that was reported in the Pacific Reporter that you made reference to?

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MR. NICKERSON: It is reported. The court part of it is reported there.

THE COURT: Yes, I think I have it.

MR. NICKERSON: Would you hand up to his Honor a copy of the Utility Commission opinion?

THE COURT: I think I have it. Wait just a moment.

(Handed to the Court)

THE COURT: That is the one I questioned you about this morning, wasn't it?

MR. NICKERSON: Yes, your Honor.

THE COURT: I have it here.

MR. NICKERSON: No, that is a different one, your Honor.

THE COURT: What is this?

MR. NICKERSON: That is the Utility Commission's opinion.

THE COURT: Oh, that is the commission's opinion.

MR. NICKERSON: Yes.

THE COURT: The one I referred to was the opinion by the Colorado court, I believe.

All right, proceed.

MR. NICKERSON: Your Honor, I might mention

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that Exhibits 206 and 207 are stipulated to be on first-hand knowledge, since Mr. Stuve made that point.

(Plaintiffs' Exhibit 207 was received in evidence)

MR. NICKERSON: Now I would like to move to Exhibit 211. I will offer, as a group, 211, 213 and 212.

Exhibit 211 is a memorandum dated April 3, 1972, with an attachment, which was sent by B. L. Brayton, Assistant Vice President of Northwest Bell, to W. E. Clement, General Accounting Manager of Northwest Bell.

213 is a memorandum dated April 6, 1972, sent by W. M. Youngman, the General Rate and Tariff Supervisor of Northwest Bell, to Edward Sklenicka, the General Solicitor of Northwest Bell.

212 is a letter dated April 7, 1972, sent by R. A. Ryerson, Assistant Vice President of Northwest Bell, to B. L. Brayton, Assistant Vice President of Northwest Bell.

These are offered, your Honor, simply to show that in Northwest Bell, in Minnesota, they issued an order to not do it by a tariff change but simply on the books; and then after consulting with AT&T

they then withdrew that order and it was thereafter done by tariff.

THE COURT: But of course the word used generally in these letter exhibits was "restructuring" the rates, and this Exhibit 213 has a word I have never seen before in this context, in the second paragraph:

"By reformatting our rates, it is possible to restructure the situation where the customers would pay less excise tax than under today's rate format."

MR. NICKERSON: Yes. And in that same memo, your Honor, you will notice the third or fourth from the last paragraph they say:

"The proposed Minnesota approach could also generate requests for refunds of excise tax payments made in the past. There is no defense that I can see for refusing to make such refunds. Such refunds, however, would not come from the telephone company, but rather would have to be provided through the IRS."

THE COURT: Do you think I ought to reconsider my ruling on counts 2, 4, 6 and 8? All right, it may be received.

MR. NICKERSON: Are those received, your Honor?

THE COURT: Yes.

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MR. STRUVE: Yes, for completeness, I believe that the record should also contain Exhibit 214, which is the opinion sent by Mr. Sklenicka.

THE COURT: I think you are right.

MR. NICKERSON: I have no objection. I think you are right, your Honor. I have no objection, and I offer it.

MR. STRUVE: And I believe the record should also show, although I think it is pretty clear, that Mr. Youngman, who wrote Exhibit 213, is not a lawyer and is in the rate and tariff group at Northwestern Bell.

(Plaintiffs' Exhibits 211, 212, 213 and 214 were received in evidence)

THE COURT: All right, Mr. Nickerson.

MR. NICKERSON: Now, your Honor, I am turning to another subject, and that is the actual unbundling by the operating companies and I draw your attention to paragraph 39 of the fact stipulation. Perhaps I should read it.

"At various times in 1971 and 1972 the defendant operating companies filed revised tariffs, establishing separate Centrex station charges for exchange access and for intercommunication. Attachment G lists the dates on which such revised tariffs were filed with state or local regulatory authorities and the dates on which such revised tariffs became effective. The revised tariff filed by New York Telephone in New York decreased its Centrex station charges by an amount which was estimated to reduce its revenues by $1100 in the first year. The revised tariff filed by C&P of West Virginia, which was filed simultaneously with the revised tariff's proposed increases in rates for other telephone services, proposed to increase its Centrex station charges by the same proportion for exchange access and for intercommunication. The revised tariffs filed by the other defendant operating companies did not result in any change in their total Centrex charges."

Then, your Honor, attachment G shows you those dates, and if you will notice that by the end of 1971, five companies had filed tariffs in at least one jurisdiction; by the end of June 1972, 13 other companies had filed in at least one jurisdiction; and within one year Mr. Dugan's letter of September 27, 1971 had been filed effective in 40 jurisdictions.

Then I would draw your attention, your Honor, to paragraph 46 of the stipulation of facts:

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That after the revised tariffs had become effective, the defendant operating companies collected from taxable Centrex customers and paid over to the United States Federal Communications excise taxes on the Centrex exchange access charge but not on the Centrex intercommunications charge.

Now, your Honor, may I read from the deposition of Mr. Burkinshaw, Thomas J. Burkinshaw:

"Q Mr. Burkinshaw, did there come a time when AT&T recommended to the associate companies that the charges for Centrex service be separated for intercommunication and exchange access?

"A Yes.

"Q Can you tell us when that occurred?

"A About September 1971.

"Q And was this recommendation contained in the general letter?

"A Yes.

"Q I'm showing you now a document which has been stamped with productions Nos. 00150 through 00164"-- that is now Exhibit 200 in evidence, your Honor -- "and ask you if you have seen that before today?

"A Yes.

"Q Is this the general letter to which you have referred?

"A To which I've what?

"Q To which you have referred in answer to the prior question.

"A Yes.

"Q Now, this letter bears the date September 27, 1971. As of the date of this letter, what was your position?

"A Well, I was a marketing supervisor at 195 Broadway and marketing and service plans department.

"Q And you were employed by AT&T?

"A That's correct.

"Q To whom did you report?

"A Bob Kemp.

"Q Can you tell us in general terms what your duties and responsibilities were as a marketing supervisor?

"A Yes, during this period of time I was responsible for Centrex administration and some sundry services that are affiliated with Centrex service in terms of developmental new effort.

"Q When you say during this period, what time frame are you referring to?

"A I'm referring to the period of time from wcrll "Burkinshaw

July 1970 to November 1973.

"Q Did you hold the position of a marketing supervisor during that period July 1970 through November 1973?

"A Yes.

"Q Prior to July of 1970, what was your position?

"A I was a staff supervisor in government communications, Washington, D. C.

"Q Was that with the Long Lines division?

"A Government communication of Long Lines.

MR. STRUVE: I should note that the title is the Long Lines Department.

"Mr. Oberman: Thank you.

"Q For how long were you with the Long Lines Department prior to July of 1970?

"A Since 1957.

"Q And following 1973, did you return to the Long Lines Department?

"A I did.

"Q But you are now situated in New York?

"A That's correct.

"Q And you are presently employed by the Long Lines Department of AT&T in New York City?

"A That's correct."

Now skipping to page 41 --

MS.STRUVE: Excuse me, Mr. Nickerson. Would you please read page 7, lines 6 through 17.

MR. NICKERSON: Page what?

MR. STRUVE: Page 7, lines 6 through 17.

MR. NICKERSON: Yes, I will,your Honor.

"Q How long prior to September 27, 1971, did you begin working on the subject of this general lett. ?"

Excuse me, your Honor, I should explain that that refers to Exhibit 200.

"A Some place in the vicinity of eight and ten months.

"Q Eight and ten months before September 1971?

"A Yes.

"Q Do you know who at AT&T was involved in deciding to make this recommendation?

"A I'm certainly sure that my boss was involved in that decision.

"Q By your boss you mean Mr. Kemp?

"A Yes."

MR. STRUVE: Now, Mr. Nickerson, could you please read from page 17, line 21, through the bottom of the page 18.

MR. NICKERSON: I think that is hearsay as to us. If he wants to offer it, he can.

THE COURT: It doesn't make any difference which one reads it.

MR. NICKERSON: But it is not a part of my case.

THE COURT: The chances are I will receive it, so one of you read it.

MR. NICKERSON: All right, your Honor.

Which line did you want me to start at?

MR. STRUVE: Page 17, line 21.

MR. NICKERSON: Line 21. All right.

"Q Between July of 1970 and the time you began work on the subject matter contained in this general letter, did you have any discussions with Mr. Kemp on why a recommendation to the operating companies had not been made at any point prior to 1971?

"A Did we discuss this?

"Q Yes.

"A Yes.

"Q Can you recall the content of those discussions?"

Your Honor, may I have a continuing objection?

THE COURT: Yes.

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BY MR. NICKERSON:

"A Vaguely, partly.

"Q Can you give us your best recollection?

"A Yes, in part, I recall that we discussed why this letter had not been issued prior to September 27, 1971 when indeed it was issued and largely, that reason revolved around two things.

"Number one, we as a company, we as a company were directing our efforts towards the complete elimination" --

THE COURT: I didn't hear. We were directing what?

MR. NICKERSON: -- "our efforts towards the complete elimination of FET on all services and we didn't choose to single out Centrex service.

"And number two, we expected FET relief on Centrex earlier than this period of time.

"Q Can you tell us what the nature of the expected FET relief for Centrex service was?

"A We expected the elimination of FET.

"Q On all services?

"A On all services including Centrex.

"Q And what you just recalled were conversations you had with Mr. Kemp?

"A Yes.

"Q Did you also?

MR. STRUVE: Excuse me, Mr. Nickerson.

In view of Mr. Nickerson's repeated statement that this constituted hearsay I wanted to state for the record that it is offered under Rule 801 (d) (1) (B), for the purpose of, in the words of the rule, rebutting an express or implied charge against Mr. Kemp of recent fabrication or improper influence or motive.

MR. NICKERSON: Have I read everything you asked?

MR. STRUVE: Yes.

MR. NICKERSON: Now let's go back to page 41, and start with line 10. The last line of page 00153 -- that is Exhibit 200, your Honor -- says:

"Q 'Tom Burkinshaw 212-339-4414 is prepared to work with your people on the marketing and rate aspects of this change.'

"Did Mr. Kemp describe to you any particular functions and responsibilities that you would have in connection with this restructuring recommendation?

"A Well, they are implied.

"Q What were the functions and responsibilities that you had as a result of this general letter?

"A As a result of this general letter, my responsibility was to track the activities in associated companies as a result of this issuance.

"Q What did you do specifically to track the operating companies?

"A A number of things. I interpreted pieces of this letter to the associated companies that weren't clear to them. We discussed in depth the rationale supporting various points of the letter and I was involved in their -- in helping them with the background information necessary for them to ultimately put a filing together and for our purposes tracking to see to it that the associated companies indeed did follow the recommendation here, that is, go file it, restructure it and file it.

"Q At the time this general letter was sent out, did you and Mr. Kemp discuss any timetable for when it was hoped that all of the operating companies would complete their filings?

"A Not specifically, not specifically. It was our intention that it be done as soon as possible, recognizing the complexity of doing this. We had no specific date in mind. We just were anxious that it was done.

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"Q Now, to your knowledge, did every company, in fact, follow the recommendation to separate Centrex rates for the two components?

"A Each company filed a tariff that separated the Centrex tariff rates.

"Q And are you familiar with the filings by each of the companies?

"A No.

"Q To your knowledge, were any hearings held by any public service commissions with respect to the refiled -- make it, revised Centrex tariffs reflecting the separation?

"A How do you define hearings? In terms of challenging the tariffs that were presented to them?

"Q Specifically, yes.

"A I don't think so. I don't know really. I just don't think so.

"Q To your recollection, did any associated companies report any such challenges to you?

"A No.

"Q To your knowledge, did the tariffs filed by each of the operating companies reflect the methodology prepared by AT&T?

"A Rephrase that question or restate it, if you

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will, please.

"Q All right. To your knowledge, did the tariffs filed by each of the operating companies reflect the methodology contained in this general letter?

"A Exactly?

"Q Well, the methodology in general terms.

"A The methodology in general terms? Yes, I think so.

"Q Did all of the tariff filings occur subsequent to September 27, 1971?

"A Yes."

Now skipping to page 45, on line 7:

"Q To your knowledge and recollection, did each of the operating companies submit to AT&T prior to the filing of the tariff including this revision its proposed separation?

"A Generally speaking, true. Generally speaking, each company sent us what they proposed to file. I don't recall if that was totally or not.

"Q Did you personally have occasion to review the proposed separations that were submitted by the operating companies?

"A In many cases, yes.

"Q Who else at AT&T was working on receiving these proposed revisions?

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"A Bob Kemp and I were the only two people involved.

"Q And what did you do when you received one of these proposals from the operating companies?

"A I reviewed them.

"Q Did you give comments?

"A Often times, yes.

"Q Did you keep a running tally on the progress of the operating companies?

"A I did and the progress in terms of their date of filing."

Skipping to line 22 of page 46:

"Q Now, to your knowledge, did any of the operating companies file revised tariffs prior to receiving comments from you with respect to the proposals they submitted?

"A They may have. Some may have.

"Q To your knowledge, did any?

"A To my knowledge, no; with the exception of Pennsylvania. They may have filed prior to the time that we reviewed it.

"Q Do you recall reviewing the proposal of Pennsylvania?

"A Yes, I do.

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"Q Did that proposal reflect the general methodology contained in the general letter?

"A As I recall -- I'd say in general, it did."

That concludes my reading from Mr. Burkinshaw's deposition.

May I have one second, your Honor?

THE COURT: Yes.

(Pause)

MR. NICKERSON: Your Honor, Mr. Heller suggests, and I am going to accept his suggestion, that I read some of the material just prior to what Mr. Struve asked me to read. I think it perhaps makes it clearer.

This is page 17, line 2:

"Q Did you and Mr. Kemp discuss in 1971 a concern that the associated companies maintain a uniform price structure for Centrex rates?

"A Not specifically, no.

"Q Was uniformity of Centrex rates a philosophy that was discussed and reflected in this letter?

"A Uniformity of methodology for restructuring Centrex rates was a point.

"Q Did you discuss uniformity of methodology with any of the associated companies prior to September

27, 1971?

"A I may have, but the very bulk of that came after ths issuance of the letter.

"Q So that after September 27, 1971, you did discuss the importance of a uniform methodology with the operating companies?

"A That's correct.

"Q Now, I believe you testified that you became a marketing supervisor in July of 1970, is that correct?

"A Yes."

MR. NICKERSON: Your Honor, I now offer Exhibit 251, which is the order of the Public Utilities Commission of the State of Colorado, and it is stipulated that this was issued by the Public Utilities Commission of the State of Colorado, decision No. 83232 dated June 22, 1973.

Your Honor, I guess we have already discussed this. I draw your attention only at this time to page 22536 the first sentence in the next to the last paragraph:

"Centrex CO service is completely different from Centrex CU service which has been discussed above."

MR. STRUVE: Your Honor, in order to

clarify the chronology I think it would be helpful to state that the language which Mr. Nickerson directed you to is quoted in this decision from an earlier decision of the Colorado Commission dated September 1972, which is cited at page 8, or page 22534 of this exhibit.

MR. NICKERSON: The one you have already before you, your Honor, I think.

THE COURT: What particular section on that page are you referring to, Mr. Struve?

MR. STRUVE: It was the earlier decision which was the subject of the Colorado Supreme Court opinion.

This later statement, which is Exhibit 251 here, was to reaffirm the earlier holding that the Centrex CO station charge should be equal to the individual business line charge, and added to that holding that Centrex CO should not be accorded a tax advantage which under the Federal Excise Tax laws cannot be accorded to individual business lines.

MR. NICKERSON: Your Honor, now I am going to another subject, and I am going to offer a series of exhibits which show that after the first filings separating the tariffs the customers that had installations in more than one jurisdiction put pressure on other companies that hadn't then separated to restructure --

to separate, excuse me -- and the first of these is Exhibit 215.

I was going to put in this one exhibit, your Honor, and then offer the whole bunch of them; they simply state the one point, but there is a whole bunch of them.

There is one, two, three, six, nine, eleven of them, but they have a very simple point in them.

THE COURT: We will take them.

MR. NICKERSON: You want all of them in a batch now?

THE COURT: Call them out so the record --

MR. NICKERSON: I will.

Exhibit 215, a letter of Sears Roebuck, dated December 3, 1971, to George Preis of AT&T in Chicago, Illinois.

Exhibit 217, from Mr. M. T. Gearhart, manager of communication services at Bethlehem Steel Corporation to R. K. Matthews, a national account manager of AT&T. That is dated February 15, 1972.

Exhibit 220A, which is a letter dated June 20, 1972, signed by someone for B. F. Campbell, national account manager, Westinghouse, of AT&T Long Lines, sent to New York Telephone, Southwest Bell, Illinois Bell,

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Pennsylvania Bell and Pacific Bell.

Exhibit 221, a letter dated November 12, 1971, sent by L. H. Callaway, general forecast and rate supervisor, Florida of Southern Bell, to T. H. Garity assistant vice president of Southern Bell.

Exhibit 224, a letter dated December 16, 1971, sent by Gene R. Conner, of Comtrol Inc., to W. T. Todd, assistant sales manager of Northwest Bell.

Exhibit 225, a memorandum dated December 9, 1971, signed by M. Kaiser, for the general marketing manager, San Antonio of Southwest Bell, and sent to the general commercial manager, San Antonio, of Southwest Bell.

Exhibit 226, a letter dated January 21, 1972, with attachment, which was sent by P. Q. Partee, regional manager, communications of Eastern Airlines, Inc., to R. J. Anthony, an account manager of Southern Bell.

Exhibit 228, a letter dated March 3, 1972, which was sent by F. M. Pelka, manager, Telecommunications of Mobil Oil Company, to Vincent Flately, and J. Fastenau, both employed in the sales department of New York Tel., and to George Wehler, national account manager in the Long Lines Department of AT&T.

Exhibit 230, a letter dated May 6, 1972, which was sent by Stuart Herbst, president of Telematics Associates, Inc., to W. C. Bauer, president of South Central Bell.

Exhibit 231, a letter dated May 24, 1972, which was sent by David N. Smith, specialist, communications, of General Electric Company to Leon Burke, an account manager of Southern Bell.

And Exhibit 232, a letter dated May 26, 1972, which was sent by Patrick R. Edwards, assistant to the president of Allied Stores Corporation, to Thomas A. Castellone, an industrial sales manager of New York Tel.

I offer those simply that those were made by those customers.

MR. STRUVE: Without attempting to address each of these exhibits individually, we have no objection to their receipt as to any defendant who prepared them or received them.

I think one comment is in order. Your Honor will have noticed the recurrence in the letters of titles such as communication specialist, communication consultant, communication manager. That is very typical for the large companies we are dealing with.

THE COURT: They may be received that way.

(Plaintiffs' Exhibits 215, 217, 220A, 221, 224, 225, 226, 228, 230, 231, and 232 were received in evidence.)

xxx

THE COURT: We will take our adjournment for the day. We will resume tomorrow at 10 o'clock. Goodnight, gentlemen.

(Adjourned to May 10, 1977, at 10 a.m.)

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~~Due and timely~~ Service of ~~three (3)~~ One copys of the within Appendix · Vol 2 is hereby admitted this

2nd day of December, 19

Attorney for

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